Appeals Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. 2015-P-0295

COMMONWEALTH,
Appellee

v.

GLENIS A. ADENSOTO,
Appellant

ON APPEAL FROM A JUDGMENT OF THE STOUGHTON DISTRICT COURT

BRIEF AND RECORD APPENDIX FOR GLENIS A. ADENSOTO

CHRISTOPHER DEMAYO (BBO #653481)
LAW OFFICE OF CHRISTOPHER DEMAYO
38 Montvale Avenue, Suite 200
Stoneham, MA 02180
(781) 572-3036
lawofficeofchristopherdemayo@gmail.com

Dated: April 14, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

RULES

CRIMINAL MODEL JURY INSTRUCTIONS

ISSUES PRESENTED

1. Was the defendant entitled to a required finding of not guilty because the government failed to prove impairment by alcohol beyond a reasonable doubt?

2. The Commonwealth was permitted to introduce evidence that on three occasions the defendant blew into a breathalyzer machine but her breath did not register. Did the trial judge err by allowing this "refusal" evidence where the breathalyzer instructions were relayed to the defendant by a remote translator over the telephone?

3. A police officer testified as to what the defendant allegedly said to the phone translator prior to and during administration of the breathalyzer test. Did the officer's testimony violate the rule against hearsay and constitutional confrontation rights?

4. Did various errors in the jury instructions have the cumulative effect of creating a substantial likelihood of a miscarriage of justice?

STATEMENT OF THE CASE

Defendant Glenis Adonsoto ("Ms. Adonsoto") was charged in Stoughton District Court with operating a motor vehicle under the influence of intoxicating liquor in violation of G.L. c. 90, § 24, and

unlicensed operation of a motor vehicle in violation of G.L. c. 90, § 10. RA:001.[1] The Commonwealth did not pursue the latter charge. RA.004. The OUI charges were heard by a jury sitting in Dedham District Court on December 4, 2013, and Ms. Adonsoto was convicted. Tr:134-35. The trial judge (McGuinness, J.) sentenced Ms. Adonsoto to a year of probation, and imposed statutory fines and fees, a 45-day loss of driver's license, and attendance at a driver alcohol education program. RA.004; Tr.136.

STATEMENT OF THE FACTS

Ms. Adonsoto is a Spanish-speaker who the time of the events in question was 20 years old. RA.001. She spent the night of July 21 and the early hours of July 22, 2012 at a friend's house in Stoughton. Tr:89. The friend was intoxicated, so sometime around 2:30 a.m., Ms. Adonsoto used the friend's car to drive herself back to her home in Brockton. Tr:89,103,108. It was dark out and there was very little traffic on the streets. Tr:51,95.

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[1] In this brief "RA" refers to the record appendix and "Tr" refers to the trial transcript. The numbers following the colon refer to relevant page numbers.

While driving home, Ms. Adonsoto was observed by John Casey, a Stoughton resident who was leaving for work at Logan Airport. Tr:47. At approximately 2:30 a.m., Casey was driving through Stoughton when he approached Route 27. Tr:47-50. He observed Ms. Adonsoto driving down Route 27 while straddling both sides of the road. Tr:51-52. He turned onto Route 27 and followed behind Ms. Adonsoto because he was driving that way to work anyway. Tr:53. Ms. Adonsoto veered left and an oncoming truck a ways off blew its horn as a warning. Tr:54-55. Ms. Adonsoto then got back in her own lane. Tr:56.

Casey called the Stoughton police to report Ms. Adonsoto. Tr:57. Casey continued driving behind Ms. Adonsoto and observed her cross the fog lane on the right side of the road many times, Tr:57-58, as well as cross the center yellow line a "couple" of times. Tr:58-59. Casey flicked his "brights" on Ms. Adonsoto five or ten times while following her. Tr:59. He observed her turn "very slowly" past the Stoughton District Court. Tr:60-61.

Approximately a half mile beyond the courthouse, Tr:61, Stoughton Police Officer Neal David, who had been dispatched in response to Casey's call, was

parked in his cruiser at the corner of School and Pearl Streets. Tr:68-70. Officer David observed Ms. Adonsoto drive through the intersection without stopping at the stop sign. Tr:72. He activated his lights, followed her, and she pulled over "appropriately." Tr:73,95. When David approached the car he smelled an odor of alcoholic beverage coming off Ms. Adonsoto, through the open window. Tr:74. He noticed her speech was slurred (though she responded in Spanish). Tr:75-76. He ordered Ms. Adonsoto to exit the car, which she did without difficulty. Tr:96. Officer David did not perform a field sobriety test on her because she did not understand what he said in English when he attempted to administer the test, Tr:76-77,98, and he did not speak Spanish. Tr:105. Ms. Adonsoto was arrested and taken to the Stoughton Police Station. Tr:77-78.

At the station, Officer David and his shift commander called a "hotline" to get an English-Spanish interpreter. Tr:78-79. The phone at the police station was kept on speakerphone mode while the translator was on the line. Tr:79. Office David read Ms. Adonsoto her Miranda rights and her rights with regard to the breathalyzer machine, and the translator

translated over the speakerphone. Tr:80-81. Ms. Adonsoto agreed to take the breathalyzer test. Tr:83. Officer David gave instructions on how to take the breathalyzer test, which involves sealing one's lips around a mouthpiece and blowing until the machine signals to stop, and the translator translated what he said. Tr:83-84. Officer David demonstrated how to blow into the machine. Tr:84. Officer David testified that Ms. Adonsoto indicated that she understood his instructions. Tr:84-85.

After an observation period of fifty minutes to an hour, Officer David administered the breathalyzer test to Ms. Adonsoto. Tr:85. The machine rejected the results of her first attempt. Tr:86. Officer David testified that the machine had rejected the breath sample because Ms. Adonsoto had not sealed her lips tightly around the sides of the mouthpiece, though they were sealed at the top and bottom. Tr:86, 106. He repeated the instructions, but the breathalyzer rejected Ms. Adonsoto's second and third attempts, as well. Tr:87-88. Officer David testified that these rejections were also due to Ms. Adonsoto's failure to properly seal her lips around the mouthpiece. Tr:88. The police ultimately deemed Ms.

Adonsoto's unsuccessful attempts to blow into the breathalyzer a "refusal." RA:008-09.

ARGUMENT

I. The Trial Court Should Have Granted Ms. Adonsoto's Motion For A Required Finding Of Not Guilty Because The Commonwealth Failed To Prove Beyond A Reasonable Doubt That She Was Impaired By Alcohol.

"To support a prima facie case for OUI, the prosecution must prove three elements: (1) the defendant was in physical operation of the vehicle; (2) on a public way or place to which the public has a right of access; and (3) had a blood alcohol content percentage of .08 or greater, or was impaired by the influence of intoxicating liquor. G.L. c. 90, § 24 (1)(a)(1)." Commonwelath v. Zeininger, 459 Mass. 775, 778 (2011). In this case, the first two elements of the crime are conceded. Ms. Adonsoto's blood alcohol content was not measured, so the issue on appeal is whether the prosecution proved beyond a reasonable doubt that she was "impaired by the influence of intoxicating liquor."

Defense counsel brought a motion for required finding of not guilty at the close of the Commonwealth's case, which was denied. RA:007. For the reasons set forth below, the trial judge should

have granted the motion because, even viewing the evidence in the light most favorable to the Commonwealth, a rational jury could not have found impairment proved beyond a reasonable doubt. Commonwealth v. Latimore, 378 Mass. 671, 678-79 (1979).

To prove impairment, the Commonwealth must show a defendant's drinking caused a "diminished capacity to operate [a vehicle] safely." Commonwealth v. Connolly, 394 Mass. 169, 173 (1985). In this case, the evidence that Ms. Adonsoto's driving was impaired rested on testimony about her driving, the arresting officer's observations of her person, and the breathalyzer machine's rejection of her breath samples. This evidence cannot support a conviction even under the deferential Latimore standard.

As to her driving, there was concededly evidence that Ms. Adonsoto committed moving violations on the night in question. Yet even viewed in the light most favorable to the government, this evidence is insufficient given its context: a 20 year-old (relatively inexperienced) driver making an unplanned trip home in middle of night, when the streets were virtually empty, and possibly while distracted by a

navigation device, phone, etc. Cf. Tr:108. There was no collision, or evidence of a near-miss, and it appears that most of the driving errors merely consisted of straying over a fog line.

Officer David's observations of Ms. Adonsoto added little to the Commonwealth's case. He testified that she smelled of alcohol, but apparently elicited no evidence of her alcohol consumption through the translator or otherwise (no empty bottles were found in the car). He testified that she was unsteady on her feet, but there were no roadside sobriety test results to suggest impairment. His testimony of Ms. Adonsoto's slurred speech is of limited value given that she answered him in Spanish, a language he didn't understand.

Finally, the evidence of the breathalyzer machine rejecting Ms. Adonsoto's breath samples was of marginal probative value because the instructions about blowing into the mouthpiece were relayed to her through a translator who was not physically present at the police station.[2] Given Officer Neal's admission

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[2] Ms. Adonsoto disputes that the breathalyzer evidence was properly admitted. See Parts II and III below. It is discussed here because the Court has considered inadmissible evidence when reviewing

that he did not understand what Ms. Adonsoto and the translator were saying, Tr:99, the jury could not have concluded with any assurance that Ms. Adonsoto understood his directions but was trying to thwart the breathalyzer test. There was no other evidence of her being uncooperative of untruthful.

Even in aggregate, the Commonwealth's evidence of impairment was too weak to survive a motion for required finding of not guilty. The Court should set reverse the conviction and order that a finding of not guilty enter.

II. The Trial Court Should Have Excluded Evidence Of The Breathalyzer Machine Rejecting Ms. Adonsoto's Breath Samples.

Over Ms. Adonsoto' repeated objections, RA:017, Tr:9-13,79-80, the trial judge permitted Officer Neal to testify about her attempts take the breathalyzer test, which the machine did not register, and which was ultimately deemed a "refusal." RA:008-09. This ruling was erroneous and prejudicial to Ms. Adonsoto. The only reason the government would offer such testimony – and the only reason it could be relevant – is to show that Ms. Adonsoto was either strategically

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rulings on motions for a required of not guilty. See Commonwealth v. Farnsworth, 76 Mass. App. Ct. 87, 98-99 (2010).

trying to avoid giving a breath sample, or else too intoxicated to follow Officer Neal's instructions. See Commonwealth v. Curley, 78 Mass. App. Ct. 163, 168 (2010); Commonwealth v. Flores, 2013 WL 1953750 (Mass. App. Ct. May 14, 2013)(unpublished). No such inference was permissible here, however, given that Ms. Adonsoto was instructed on the test by a phone translator who could not demonstrate how to blow into the mouthpiece and could see neither Ms. Adonsoto nor Officer Neal.

The trial court erred in relying on Curley as authority for the admission of the breathalyzer evidence in this case. RA:010; Tr:9-11. In Curley, this Court permitted the Commonwealth to introduce evidence of a defendant's failed attempts to take a breathalyzer test because it found that, under the circumstances, these failed attempts could be evidence of consciousness of guilt. Notably, the plaintiff had apparently feigned dehydration in order to be taken to a hospital after his unsuccessful breathalyzer test, then was overheard bragging from a hospital room that he'd "pulled a fast one" on the police. 78 Mass. App. Ct. at 168. This Court rejected the argument that admission of evidence regarding the defendant's failed

attempts to take a breathalyzer test violated his right against self-incrimination, reasoning that the defendant "could have refused to take the breathalyzer test." Id. at 165. The Court then held that the breathalyzer evidence was properly admitted because "the jury could have inferred from his actions, as the Commonwealth argued, that [the defendant] was trying to avoid giving a sample while appearing to try to take the test." Id. at 168.

Similarly, in Flores, this Court found that "The evidence showed that, on each attempt (and despite repeated instruction), the defendant sucked air into the tube instead of blowing one continuous breath, thus raising a question as to whether his efforts were sincere or were designed to sabotage the results." 2013 WL 1953750, *1.

Here, unlike Curley and Flores, the jury could not reasonably infer that Ms. Adonsoto was trying to "game" the breathalyzer test given the likelihood that she was simply confused and flustered by the language barrier and the use of a remote translator. Cf. People v. Morel-Gomez, 2011 WL 5513684, *8 (N.Y. Sup. Ct. June 13, 2011)(noting, in context of Spanish-speaking defendant, "[T]he usual inference that

defendant was deliberately trying to frustrate the breathalyzer machine presupposes that he had been told and understood that he had to blow vigorously for a sustained period of time.")

Under these circumstances, there was no reason for the trial court to depart from the default rule that evidence of refusal to take a breathalyzer is inadmissible, G.L. c. 90 § 24(1)(e), and that failure to provide an adequate breath sample for a breathalyzer constitutes such inadmissible refusal evidence. 501 C.M.R. ("If the arrestee fails to supply the required breath samples upon request, the test shall be terminated and it shall be noted as a refusal."). The testimony regarding Ms. Adonsoto's "refusal" to take the breathalyzer test had negligible probative value, but was prejudicial because it misleadingly suggested consciousness of guilt. See Mass. G. Evid. § 403 (evidence must be excluded where "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, [or] misleading the jury..."); Commonwealth v. Jones, 464 Mass. 16, 19-21 (2012)(applying Rule 403 to breathalyzer evidence).

Trial counsel objected to admission of the breathalyzer evidence in limine, RA:017, and at trial, Tr:9-13,[3] therefore this Court reviews to determine whether it is "sure that the error did not influence the jury, or had but very slight effect." Commonwealth v. Gambora, 457 Mass. 715, 723-24 (2010)(citation an internal quotation marks omitted). The Court cannot be sure that the error did not influence the jury given that the Commonwealth's case was not strong (see Part I above); the jury apparently viewed the case as a close one, given its initial deadlock, RA:006; and the prosecutor stressed the breathalyzer evidence during his closing argument. See, e.g., Tr:119 ("When she is given instructions to simply blow on something and to close her mouth for a

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[3] The breathalyzer evidence was the subject of competing motions in limine by the Commonwealth and Ms. Adonsoto. RA:010-17. During oral argument, the trial judge cut off defense counsel's attempt to explain that Curley applies only where there is a reasonable basis to infer consciousness of guilt. Tr:11. Defense counsel renewed his objection when the prosecutor began to elicit testimony from Officer David about the breathalyzer. Tr:79-81. The Court should treat the issue as fully preserved. Commonwealth v. Koney, 421 Mass. 295, 299 (1995)(adequacy of the objection "to be assessed in the context of the trial as a whole"); Commonwealth v. Conley, 34 Mass. App. Ct. 50, 54 n.1(1993)(treating objection as fully preserved where judge "cut off defense counsel from any further discussion").

period of time she can't do it."). For these reasons, as well as the other errors discussed in Parts III and IV below, a new trial is required. See Commonwealth v. Mills, 47 Mass. App. Ct. 500, 507 (1999) ("While each error in isolation might not have required reversal, we conclude that the cumulative errors fatally infected the judgment of conviction.")(citation and internal quotation marks omitted).

III. Officer David's Testimony Regarding What Ms. Adonsoto Said Through The Translator Was Hearsay And Violated Ms. Adonsoto's Right To Confront The Translator.

A. Officer David's Testimony Violated The Hearsay Rule.

At trial, Officer David testified at length as to what the phone translator told him Ms. Adonsoto had said, and his testimony was offered for the truth of the matters asserted. See, e.g., Tr:81-82 (Ms. Adonsoto told the translator she understood her Miranada rights and breathalyzer rights); Tr:83 (Ms. Adonsoto, through the translator, consented to take the breathalyzer test and understood the instructions); Tr:89 (Ms. Adonsoto told the translator she drove herself home because her friend was too intoxicated to drive her). Officer David's testimony

was therefore hearsay.[4] Mass. G. Evid. § 801(c) (hearsay is an out-of-court statement offered for the truth of the matter). Although Ms. Adonsoto's statements were not themselves hearsay, and might have been properly introduced through the **translator's** testimony as statements of a party opponent, see Mass. G. Evid. § 801(d)(2)(A), it was hearsay for **Officer David** to testify as to what Ms. Adonsoto said through the translator. This testimony (Tr:80-89) was therefore inadmissible. Mass. G. Evid. § 802.

The Commonwealth should have produced the translator as a witness if it wished to introduce evidence of what Ms. Adonsoto said at the police

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[4] Defense counsel, Mr. Eisenstadt, objected at trial when the prosecutor began to elicit testimony from Officer David about what Ms. Adonsoto had said through the translator. There followed a sidebar which was not entirely audible. Tr:80. Ms. Adonsoto's appellate counsel subsequently filed a motion to settle the record, RA:018-31, and in connection with this motion Mr. Eisenstadt filed an affidavit stating his objection was "essentially that Officer David's testimony was hearsay." RA:030. Judge McGuinness denied the motion in a handwritten order, stating "I am unable to adopt attorney Eisenstadt's recollection of the sidebar conversation," but not stating his recollection of what **had** been said at the sidebar. RA:032. Accordingly, Ms. Adonsoto has assumed the error is unpreserved and that a substantial risk of a miscarriage of justice standard applies. Commonwealth v. Keevan, 400 Mass. 557, 562 (1987).

station. See, e.g., Commonwealth v. Jules, 464 Mass. 478, 487 (2013)(translator testimony regarding what defendant had said). The Commonwealth made no proffer at trial that the translator — whose phone translation service **it** had selected — was unavailable to testify.[5] Yet even if, arguendo, the translator had been unavailable, none of the exceptions to hearsay rule would have allowed Officer David to testify in her stead. See Mass. G. Evid. § 804 (listing hearsay exceptions where declarant unavailable). Therefore, there was no way for the Commonwealth to introduce evidence of what Ms. Adonsoto said at the police station without producing the translator to testify. See State v. Morales, 269 P.3d 263 (Wash. 2012)(inadmissible hearsay for state trooper to testify that translator had conveyed his statutory OUI warning to defendant); People v. Bartee, 566 N.E.2d 855, 857-58 (Ill. App. Ct. 1991)(defendant could not impeach witness by calling police officer to recount what witness had said where wife had translated; wife was proper witness).

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[5] Had Ms. Adonsoto selected her, the translator might have arguably been considered Ms. Adonsoto's agent for purposes of the hearsay rule. See Mass. G. Evid. § 801(d)(2)(C) and (D).

Had the Commonwealth produced the translator to testify, the jury would have heard a first-hand account of what Ms. Adonsoto had said (albeit in translation), rather than Officer David's summary testimony that she had understood everything. Also, if the translator had appeared live, defense counsel could have cross examined her and inquired about the extent to which she and Ms. Adonsoto had understood one another over the phone, as well as any difficulties translating the breathalyzer instructions given that she was not present at the police station and could not see what was happening.

Given the less than overwhelming nature of the Commonwealth's case against Ms. Adonsoto (see Part I above), the relative importance of the breathalyzer evidence, and the other errors discussed in this brief, the Court cannot be sure that the admission of this hearsay did not materially influence the guilty verdict. Therefore, the verdict must be set aside due to a substantial risk of a miscarriage of justice. Commonwealth v. Alphas, 430 Mass. 8, 13 (1999).

B. Officer David's Testimony Violated The Confrontation Clause.

Officer David's testimony as to what Ms. Adonsoto said through the phone translator was not only inadmissible hearsay, but also a violation of Ms. Adonsoto's confrontation rights under the Sixth Amendment of the U.S. Constitution and Article 12 of the Massachusetts Declaration of Rights.[6]

The federal Confrontation Clause prohibits the government's use at trial of out-of-court statements that are "testimonial" in nature where the declarant is unavailable for cross examination. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009). A declarant's statements are "testimonial" under the Confrontation Clause when "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial". Id. (citation omitted). Statements made during a police interrogation are necessarily testimonial. Crawford v. Washington, 541 U.S. 36, 52 (2004).

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[6] In cases such as this one, involving exceptions to the hearsay rule, art. 12 apparently provides protections coextensive with the Sixth Amendment. Commonwealth v. DeOliveira, 447 Mass. 56, 57 n.1 (2006).

It follows that Ms. Adonsoto should have been allowed to confront the translator at trial and cross examine her. A recent federal case, United States v. Charles, 722 F.3d 1319 (11th Cir. 2013) is instructive. In Charles, as here, the defendant was interrogated by the authorities (customs agents) through an "over-the-phone interpreter service" under contract with the government. Id. at 1321. At trial, a customs agent testified to what the defendant had said through the translator. Id. The court held that the defendant had been entitled to confront the translator:

> [T]he government sought admission of the interpreter's statements of what Charles said to prove the truth of those statements. Thus, the interpreter's English language statements of what Charles told her in Creole are testimonial and subject to Crawford's mandate governing the Confrontation Clause … [F]or purposes of the Confrontation Clause, there are two sets of testimonial statements that were made out-of-court by two different declarants. Charles is the declarant of her out-of-court Creole language statements and the language interpreter is the declarant of her out-of-court English language statements [thus interpreter's presence required].

Charles, 722 F.3d at 1323-24 (citation omitted). The reasoning in Charles is persuasive and the Court should apply it to this case.

Although some courts take a more flexible approach than the Eleventh Circuit, and will treat the translator as a mere "language conduit" for the speaker in appropriate circumstances, their analysis considers the party who supplied the translator and the qualifications of the translator. See, e.g., United States v. Nazemian, 948 F.2d 522, 527-28 (9th Cir.1991). Given that the police supplied the translator here, and there is no evidence of her qualifications, Tr:104, these courts would also exclude Officer Neal's hearsay testimony as a violation of confrontation rights.

For the reasons noted above in part II(A), Ms. Adonsoto's inability to confront to translator resulted in the jury hearing only Officer David's summary testimony that she had understood everything he had said. This was prejudicial and may have affected the verdict, given that the Commonwealth's case was not overwhelming. The Court should set aside the verdict and order a new trial.

IV. Errors In The Jury Instructions Had The Aggregate Effect Of Creating A Substantial Risk Of A Miscarriage Of Justice.

During the jury charge, the trial judge made three errors when reading the instructions. Defense

counsel did not object to these errors, therefore the Court reviews to determine whether they created a substantial risk of a miscarriage of justice. See Commonwealth v. Hart, 428 Mass. 614, 616 (1999). As discussed below, such a risk exists and warrants a new trial.

First, when charging the jury on the presumption of innocence, the judge stated:

> The presumption of innocence stays with the defendant unless and until the evidence convinces you unanimously as a jury that the defendant is guilty beyond a reasonable doubt. **It requires you to find the defendant unless her guilt has been proved beyond a reasonable doubt.** Your verdict whether it is guilty or not guilty must be unanimous.

Tr:125. The judge should have said it "requires you to find the defendant **not guilty** unless…" Massachusetts District Court Criminal Model Jury Instruction 2.160.

Second, when charging the jury on the credibility of witnesses, the judge instructed:

> You should give the testimony of a witness whatever degree **you believe and what you** judge it is fairly entitled to receive.

Tr:128. The judge should have said, "You should give the testimony of each witness whatever degree **of belief and importance that you** judge it is fairly

entitled to receive." Massachusetts District Court Criminal Model Jury Instruction 2.260.

Finally, Judge McGuinness made an error when charging the jury on reasonable doubt. He said:

> It is not enough for the Commonwealth to establish a probability, even a strong probability, that the defendant is more likely to be guilty than not guilty that is not enough; instead, the evidence must convince you of the defendant's guilt to a reasonable and moral certainty, a certainty that convinces your understanding and satisfies your reason and judgment as jurors who are sworn to act consciously upon the evidence. **That is what we mean by proof beyond doubt.**

Tr:131-32. The instruction was correct until the last sentence, which should have read, "That is what we mean by proof beyond **a reasonable** doubt." Massachusetts District Court Criminal Model Jury Instruction 2.180.

Although the Supreme Judicial Court has been reluctant to reverse a conviction based on a judge's mere "slip of the tongue" in a jury instruction, Commonwealth v. Grant, 418 Mass. 76, 84-85 (1994), it has also made clear that judges must ensure "all necessary instructions are given in adequate words." Commonwealth v. Torres, 420 Mass. 479, 484 (1995). Here, the cumulative effect of these three errors,

made in the course of a short jury charge, was to render the instructions inadequate. The instruction on witness credibility, as stated to the jury, was essentially meaningless; it is unclear that a reasonable juror would have fathomed its intended meaning. The omission of the word "reasonable" from the "reasonable doubt" instruction undermined the preceding language on moral certainty, and this confusion was not offset by the benefit of the more modern definition of "moral certainty" required prospectively by Commonwealth v. Russell, 470 Mass. 464 (2015). The Court cannot be sure that the cumulative effect of the errors in the jury instructions, as well as the other errors discussed above, did not materially influence the verdict. Therefore, the Court should set aside the verdict and order a new trial. Alphas, 430 Mass. at 13.

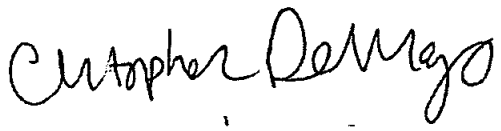
CONCLUSION

For the reasons set forth in Part I of the Argument, the Court should reverse the conviction. In the alternative, for the reasons set forth in Parts II, III, and IV of the Argument, the Court should set aside the conviction and order a new trial.

Respectfully submitted,

Glenis Adonsoto

By her attorney,

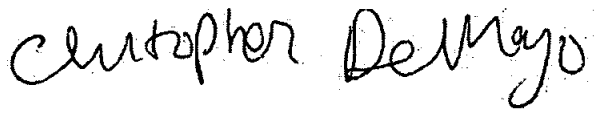


Christopher DeMayo (BBO # 653481)
Law Office of Christopher DeMayo
38 Montvale Avenue, Suite 200
Stoneham, MA 02180
781-572-3036
lawofficeofchristopherdemayo@gmail.com

Dated: April 14, 2015

CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE MASS. R. A. P. 16(K)

I, Christopher DeMayo, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to, Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).



Christopher DeMayo (BBO # 653481)
Law Office of Christopher DeMayo
38 Montvale Avenue, Suite 200
Stoneham, MA 02180
781-572-3036
lawofficeofchristopherdemayo@gmail.com

ADDENDUM TABLE OF CONTENTS

Massachusetts Laws

- Massachusetts Constitution
- General Laws
- Session Laws
- Rules

General Laws

Print Page

PART I	ADMINISTRATION OF THE GOVERNMENT	NEXT
TITLE XIV	PUBLIC WAYS AND WORKS	PREV NEXT
CHAPTER 90	MOTOR VEHICLES AND AIRCRAFT	PREV NEXT
Section 10	Operation of motor vehicle without license; members of armed forces; nonresidents; suspension or revocation of license	PREV NEXT

Section 10. No person under sixteen years of age shall operate a motor vehicle upon any way. No other person shall so operate unless licensed by the registrar unless he possesses a receipt issued under section eight for persons licensed in another state or country or unless he possesses a valid learner's permit issued under section eight B, except as is otherwise herein provided or unless he is the spouse of a member of the armed forces of the United States who is accompanying such member on military or naval assignment to this commonwealth and who has a valid operator's license issued by another state, or unless he is on active duty in the armed forces of the United States and has in his possession a license to operate motor vehicles issued by the state where he is domiciled, or unless he is a member of the armed forces of the United States returning from active duty outside the United States, and has in his possession a license to operate motor vehicles issued by said armed forces in a foreign country, but in such case for a period of not more than forty-five days after his return. The motor vehicle of a nonresident may be operated on the ways of the commonwealth in accordance with section three by its owner or by any nonresident operator without a license from the registrar if the nonresident operator is duly licensed under the laws of the state or country where such vehicle is registered and has such license on his person or in the vehicle in some easily accessible place. Subject to the provisions of section three, a nonresident who holds a license under the laws of the state or country in which he resides may operate any motor vehicle of a type which he is licensed to operate under said license, duly registered in this commonwealth or in any state or country; provided, that he has the license on his person or in the vehicle in some easily accessible place, and that, as finally determined by the registrar, his state or country grants substantially similar privileges to residents of this commonwealth and prescribes and enforces standards of fitness for operations of motor vehicles substantially as high as those prescribed and enforced by this

commonwealth.

Notwithstanding the foregoing provisions, no person shall operate on the ways of the commonwealth any motor vehicle, whether registered in this commonwealth or elsewhere, if the registrar shall have suspended or revoked any license to operate motor vehicles issued to him under this chapter, or shall have suspended his right to operate such vehicles, and such license or right has not been restored or a new license to operate motor vehicles has not been issued to him. Operation of a motor vehicle in violation of this paragraph shall be subject to the same penalties as provided in section twenty-three for operation after suspension or revocation and before restoration or issuance of a new license or the restoration of the right to operate.

Massachusetts Laws

- Massachusetts Constitution
- General Laws
- Session Laws
- Rules

General Laws

Print Page

PART I	ADMINISTRATION OF THE GOVERNMENT	NEXT
TITLE XIV	PUBLIC WAYS AND WORKS	PREV NEXT
CHAPTER 90	MOTOR VEHICLES AND AIRCRAFT	PREV NEXT
Section 24	Driving while under influence of intoxicating liquor, etc.; second and subsequent offenses; punishment; treatment programs; reckless and unauthorized driving; failure to stop after collision	PREV NEXT

Section 24. (1) (a) (1) Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue shall be punished by a fine of not less than five hundred nor more than five thousand dollars or by imprisonment for not more than two and one-half years, or both such fine and imprisonment.

There shall be an assessment of $250 against a person who is convicted of, is placed on probation for, or is granted a continuance without a finding for or otherwise pleads guilty to or admits to a finding of sufficient facts of operating a motor vehicle while under the influence of intoxicating liquor, marijuana, narcotic drugs, depressants or stimulant substances under this section; provided, however, that but $187.50 of the amount collected under this assessment shall be deposited monthly by the court with the state treasurer for who shall deposit it into the Head Injury Treatment Services Trust Fund, and the remaining amount of the assessment shall be credited to the General Fund. The assessment shall not be subject to reduction or waiver by the court for any reason.

There shall be an assessment of $50 against a person who is convicted, placed on probation or granted a continuance without a finding or who otherwise pleads guilty to or admits to a finding of sufficient facts for operating a motor vehicle while under the influence of intoxicating liquor or under the influence of marihuana, narcotic drugs, depressants or stimulant substances, all as defined by section 1 of chapter 94C, pursuant to this section or

section 24D or 24E or subsection (a) or (b) of section 24G or section 24L. The assessment shall not be subject to waiver by the court for any reason. If a person against whom a fine is assessed is sentenced to a correctional facility and the assessment has not been paid, the court shall note the assessment on the mittimus. The monies collected pursuant to the fees established by this paragraph shall be transmitted monthly by the courts to the state treasurer who shall then deposit, invest and transfer the monies, from time to time, into the Victims of Drunk Driving Trust Fund established in section 66 of chapter 10. The monies shall then be administered, pursuant to said section 66 of said chapter 10, by the victim and witness assistance board for the purposes set forth in said section 66. Fees paid by an individual into the Victims of Drunk Driving Trust Fund pursuant to this section shall be in addition to, and not in lieu of, any other fee imposed by the court pursuant to this chapter or any other chapter. The administrative office of the trial court shall file a report detailing the amount of funds imposed and collected pursuant to this section to the house and senate committees on ways and means and to the victim and witness assistance board not later than August 15 of each calendar year.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation preceding the date of the commission of the offense for which he has been convicted, the defendant shall be punished by a fine of not less than six hundred nor more than ten thousand dollars and by imprisonment for not less than sixty days nor more than two and one-half years; provided, however, that the sentence imposed upon such person shall not be reduced to less than thirty days, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until such person has served thirty days of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such thirty day sentence to the extent such resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth, or any other jurisdiction because of a like offense two times preceding the date of the commission of the offense for which he has been convicted, the defendant shall be punished by a fine of not less than one thousand nor more than fifteen thousand dollars and by imprisonment for not less than one hundred and eighty days nor more than two and one-half

years or by a fine of not less than one thousand nor more than fifteen thousand dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence imposed upon such person shall not be reduced to less than one hundred and fifty days, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served one hundred and fifty days of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative, to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such one hundred and fifty days sentence to the extent such resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense three times preceding the date of the commission of the offense for which he has been convicted the defendant shall be punished by a fine of not less than one thousand five hundred nor more than twenty-five thousand dollars and by imprisonment for not less than two years nor more than two and one-half years, or by a fine of not less than one thousand five hundred nor more than twenty-five thousand dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence imposed upon such person shall not be reduced to less than twelve months, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until such person has served twelve months of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such twelve months sentence to the extent that resources are available in a correctional facility specifically designated by the department of correction for the incarceration and

rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense four or more times preceding the date of the commission of the offense for which he has been convicted, the defendant shall be punished by a fine of not less than two thousand nor more than fifty thousand dollars and by imprisonment for not less than two and one-half years or by a fine of not less than two thousand nor more than fifty thousand dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence imposed upon such person shall not be reduced to less than twenty-four months, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served twenty-four months of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such twenty-four months sentence to the extent that resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

A prosecution commenced under the provisions of this subparagraph shall not be placed on file or continued without a finding except for dispositions under section twenty-four D. No trial shall be commenced on a complaint alleging a violation of this subparagraph, nor shall any plea be accepted on such complaint, nor shall the prosecution on such complaint be transferred to another division of the district court or to a jury-of-six session, until the court receives a report from the commissioner of probation pertaining to the defendant's record, if any, of prior convictions of such violations or of assignment to an alcohol or controlled substance education, treatment, or rehabilitation program because of a like offense; provided, however, that the provisions of this paragraph shall not justify the postponement of any such trial or of the acceptance of any such plea for more than five working days after the date of the defendant's arraignment. The commissioner of probation shall give priority to requests for such records.

At any time before the commencement of a trial or acceptance of a plea on a complaint alleging a violation of this subparagraph, the prosecutor may apply for the issuance of a new complaint pursuant to section thirty-five A of chapter two hundred and eighteen alleging a violation of this subparagraph and one or more prior like violations. If such application is made, upon motion of the prosecutor, the court shall stay further proceedings on the original

complaint pending the determination of the application for the new complaint. If a new complaint is issued, the court shall dismiss the original complaint and order that further proceedings on the new complaint be postponed until the defendant has had sufficient time to prepare a defense.

If a defendant waives right to a jury trial pursuant to section twenty-six A of chapter two hundred and eighteen on a complaint under this subdivision he shall be deemed to have waived his right to a jury trial on all elements of said complaint.

(2) Except as provided in subparagraph (4) the provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person charged with a violation of subparagraph (1) and if said person has been convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program because of a like offense by a court of the commonwealth or any other jurisdiction preceding the commission of the offense with which he is charged.

(3) Notwithstanding the provisions of section six A of chapter two hundred and seventy-nine, the court may order that a defendant convicted of a violation of subparagraph (1) be imprisoned only on designated weekends, evenings or holidays; provided, however, that the provisions of this subparagraph shall apply only to a defendant who has not been convicted previously of such violation or assigned to an alcohol or controlled substance education, treatment or rehabilitation program preceding the date of the commission of the offense for which he has been convicted.

(4) Notwithstanding the provisions of subparagraphs (1) and (2), a judge, before imposing a sentence on a defendant who pleads guilty to or is found guilty of a violation of subparagraph (1) and who has not been convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense two or more times of the date of the commission of the offense for which he has been convicted, shall receive a report from the probation department of a copy of the defendant's driving record, the criminal record of the defendant, if any, and such information as may be available as to the defendant's use of alcohol and may, upon a written finding that appropriate and adequate treatment is available to the defendant and the defendant would benefit from such treatment and that the safety of the public would not be endangered, with the defendant's consent place a defendant on probation for two years; provided, however, that a condition for such probation shall be that the defendant be confined for no less than fourteen days in a residential alcohol treatment program and to participate in an out patient counseling program designed for such offenders as provided or sanctioned by the division of alcoholism, pursuant to regulations to be promulgated by said division in consultation with the department of correction and with the approval of the secretary of health and human services or at any other facility so sanctioned or regulated as may be established by the commonwealth or any political subdivision thereof for the purpose of alcohol or drug treatment or rehabilitation, and comply with all conditions of said residential alcohol treatment program. Such condition of probation shall specify a date before which such residential alcohol treatment program shall be attended and completed.

Failure of the defendant to comply with said conditions and any other terms of probation as imposed under this section shall be reported forthwith to the court and proceedings under the provisions of section three of chapter two hundred and seventy-nine shall be commenced. In such proceedings, such defendant shall be taken before the court and if the court finds that he has failed to attend or complete the residential alcohol treatment program before the date specified in the conditions of probation, the court shall forthwith specify a second date before which such defendant shall attend or complete such program, and unless such defendant shows extraordinary and compelling reasons for such failure, shall forthwith sentence him to imprisonment for not less than two days; provided, however, that such sentence shall not be reduced to less than two days, nor suspended, nor shall such person be eligible for furlough or receive any reduction from his sentence for good conduct until such person has served two days of such sentence; and provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or of the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; or to engage in employment pursuant to a work release program. If such defendant fails to attend or complete the residential alcohol treatment program before the second date specified by the court, further proceedings pursuant to said section three of said chapter two hundred and seventy-nine shall be commenced, and the court shall forthwith sentence the defendant to imprisonment for not less than thirty days as provided in subparagraph (1) for such a defendant.

The defendant shall pay for the cost of the services provided by the residential alcohol treatment program; provided, however, that no person shall be excluded from said programs for inability to pay; and provided, further, that such person files with the court, an affidavit of indigency or inability to pay and that investigation by the probation officer confirms such indigency or establishes that payment of such fee would cause a grave and serious hardship to such individual or to the family of such individual, and that the court enters a written finding thereof. In lieu of waiver of the entire amount of said fee, the court may direct such individual to make partial or installment payments of the cost of said program.

(b) A conviction of a violation of subparagraph (1) of paragraph (a) shall revoke the license or right to operate of the person so convicted unless such person has not been convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program because of a like offense by a court of the commonwealth or any other jurisdiction preceding the date of the commission of the offense for which he has been convicted, and said person qualifies for disposition under section twenty-four D and has consented to probation as provided for in said section twenty-four D; provided, however, that no appeal, motion for new trial or exceptions shall operate to stay the revocation of the license or the right to operate. Such revoked license shall immediately be surrendered to the prosecuting officer who shall forward the same to the registrar. The court shall report immediately any revocation, under this section, of a license or right to operate to the registrar and to the

police department of the municipality in which the defendant is domiciled. Notwithstanding the provisions of section twenty-two, the revocation, reinstatement or issuance of a license or right to operate by reason of a violation of paragraph (a) shall be controlled by the provisions of this section and sections twenty-four D and twenty-four E.

(c) (1) Where the license or right to operate has been revoked under section twenty-four D or twenty-four E, or revoked under paragraph (b) and such person has not been convicted of a like offense or has not been assigned to an alcohol or controlled substance education, treatment or rehabilitation program because of a like offense by a court of the commonwealth or any other jurisdiction preceding the date of the commission of the offense for which he has been convicted, the registrar shall not restore the license or reinstate the right to operate to such person unless the prosecution of such person has been terminated in favor of the defendant, until one year after the date of conviction; provided, however, that such person may, after the expiration of three months from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license for employment or educational purposes, which license shall be effective for not more than an identical twelve hour period every day on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control, and the registrar may, in his discretion, issue such license under such terms and conditions as he deems appropriate and necessary; and provided, further, that such person may, after the expiration of six months from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such a license under such terms and conditions as he deems appropriate and necessary.

(2) Where the license or the right to operate of a person has been revoked under paragraph (b) and such person has been previously convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation preceding the date of the commission of the offense for which such person has been convicted, the registrar shall not restore the license or reinstate the right to operate of such person unless the prosecution of such person has been terminated in favor of the defendant, until two years after the date of the conviction; provided, however, that such person may, after the expiration of 1 year from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license for employment or education purposes, which license shall be effective for not more than an identical twelve hour period every day on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and that such person shall have successfully completed the residential treatment program in subparagraph (4) of paragraph (a) of subdivision (1), or such treatment program mandated by section twenty-four D, and the registrar may, in his discretion, issue such license under such terms and conditions as he deems appropriate and necessary; and provided, further, that such person may, after the

expiration of 18 months from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such a license under such terms and conditions as he deems appropriate and necessary. A mandatory restriction on a hardship license granted by the registrar under this subparagraph shall be that such person have an ignition interlock device installed on each vehicle owned, each vehicle leased and each vehicle operated by the licensee for the duration of the hardship license.

(3) Where the license or right to operate of any person has been revoked under paragraph (b) and such person has been previously convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program because of a like offense by a court of the commonwealth or any other jurisdiction two times preceding the date of the commission of the crime for which he has been convicted or where the license or right to operate has been revoked pursuant to section twenty-three due to a violation of said section due to a prior revocation under paragraph (b) or under section twenty-four D or twenty-four E, the registrar shall not restore the license or reinstate the right to operate to such person, unless the prosecution of such person has terminated in favor of the defendant, until eight years after the date of conviction; provided however, that such person may, after the expiration of two years from the date of the conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license for employment or education purposes, which license shall be effective for not more than an identical twelve hour period every day, on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such license under such terms and conditions as he deems appropriate and necessary; and provided, further, that such person may, after the expiration of four years from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such a license under such terms and conditions as he deems appropriate and necessary. A mandatory restriction on a hardship license granted by the registrar under this subparagraph shall be that such person have an ignition interlock device installed on each vehicle owned, each vehicle leased and each vehicle operated by the licensee for the duration of the hardship license.

(31/2) Where the license or the right to operate of a person has been revoked under paragraph (b) and such person has been previously convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation three times preceding the date of the commission of the offense for which such person has been convicted, the registrar shall not restore the license or reinstate the right to operate of such person unless the prosecution of such person has been terminated in favor of the defendant, until ten years after the date of the conviction; provided, however, that such person may, after the

expiration of five years from the date of the conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license for employment or education purposes which license shall be effective for an identical twelve hour period every day on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such license under such terms and conditions as he deems appropriate and necessary; and provided, further, that such person may, after the expiration of eight years from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such a license under the terms and conditions as he deems appropriate and necessary. A mandatory restriction on a hardship license granted by the registrar under this subparagraph shall be that such person have an ignition interlock device installed on each vehicle owned, each vehicle leased and each vehicle operated by the licensee for the duration of the hardship license.

(33/4) Where the license or the right to operate of a person has been revoked under paragraph (b) and such person has been previously convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation four or more times preceding the date of the commission of the offense for which such person has been convicted, such person's license or right to operate a motor vehicle shall be revoked for the life of such person, and such person shall not be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship; provided, however, that such license shall be restored or such right to operate shall be reinstated if the prosecution of such person has been terminated in favor of such person. An aggrieved party may appeal, in accordance with the provisions of chapter thirty A, from any order of the registrar of motor vehicles under the provisions of this section.

(4) In any prosecution commenced pursuant to this section, introduction into evidence of a prior conviction or a prior finding of sufficient facts by either certified attested copies of original court papers, or certified attested copies of the defendant's biographical and informational data from records of the department of probation, any jail or house of corrections, the department of correction, or the registry, shall be prima facie evidence that the defendant before the court had been convicted previously or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction. Such documentation shall be self-authenticating and admissible, after the commonwealth has established the defendant's guilt on the primary offense, as evidence in any court of the commonwealth to prove the defendant's commission of any prior convictions described therein. The commonwealth shall not be required to introduce any additional corrobating evidence, nor live witness testimony to establish the validity of such prior convictions.

(d) For the purposes of subdivision (1) of this section, a person shall be deemed to have been convicted if he pleaded guilty or nolo contendere or admits to a finding of sufficient facts or was found or adjudged guilty by a court of competent jurisdiction, whether or not he was placed on probation without sentence or under a suspended sentence or the case was placed on file, and a license may be revoked under paragraph (b) hereof notwithstanding the pendency of a prosecution upon appeal or otherwise after such a conviction. Where there has been more than one conviction in the same prosecution, the date of the first conviction shall be deemed to be the date of conviction under paragraph (c) hereof.

(e) In any prosecution for a violation of paragraph (a), evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by a chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor; provided, however, that if such test or analysis was made by or at the direction of a police officer, it was made with the consent of the defendant, the results thereof were made available to him upon his request and the defendant was afforded a reasonable opportunity, at his request and at his expense, to have another such test or analysis made by a person or physician selected by him; and provided, further, that blood shall not be withdrawn from any party for the purpose of such test or analysis except by a physician, registered nurse or certified medical technician. Evidence that the defendant failed or refused to consent to such test or analysis shall not be admissible against him in a civil or criminal proceeding, but shall be admissible in any action by the registrar under paragraph (f) or in any proceedings provided for in section twenty-four N. If such evidence is that such percentage was five one-hundredths or less, there shall be a permissible inference that such defendant was not under the influence of intoxicating liquor, and he shall be released from custody forthwith, but the officer who placed him under arrest shall not be liable for false arrest if such police officer had reasonable grounds to believe that the person arrested had been operating a motor vehicle upon any such way or place while under the influence of intoxicating liquor; provided, however, that in an instance where a defendant is under the age of twenty-one and such evidence is that the percentage, by weight, of alcohol in the defendant's blood is two one-hundredths or greater, the officer who placed him under arrest shall, in accordance with subparagraph (2) of paragraph (f), suspend such defendant's license or permit and take all other actions directed therein, if such evidence is that such percentage was more than five one-hundredths but less than eight one-hundredths there shall be no permissible inference. A certificate, signed and sworn to, by a chemist of the department of the state police or by a chemist of a laboratory certified by the department of public health, which contains the results of an analysis made by such chemist of the percentage of alcohol in such blood shall be prima facie evidence of the percentage of alcohol in such blood.

(f) (1) Whoever operates a motor vehicle upon any way or in any place to which the public has right to access, or upon any way or in any place to which the public has access as invitees or licensees, shall be deemed to have consented to submit to a chemical test or analysis of his breath or blood in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor; provided, however, that no such person shall

be deemed to have consented to a blood test unless such person has been brought for treatment to a medical facility licensed under the provisions of section 51 of chapter 111; and provided, further, that no person who is afflicted with hemophilia, diabetes or any other condition requiring the use of anticoagulants shall be deemed to have consented to a withdrawal of blood. Such test shall be administered at the direction of a police officer, as defined in section 1 of chapter 90C, having reasonable grounds to believe that the person arrested has been operating a motor vehicle upon such way or place while under the influence of intoxicating liquor. If the person arrested refuses to submit to such test or analysis, after having been informed that his license or permit to operate motor vehicles or right to operate motor vehicles in the commonwealth shall be suspended for a period of at least 180 days and up to a lifetime loss, for such refusal, no such test or analysis shall be made and he shall have his license or right to operate suspended in accordance with this paragraph for a period of 180 days; provided, however, that any person who is under the age of 21 years or who has been previously convicted of a violation under this section, subsection (a) of section 24G, operating a motor vehicle with a percentage by weight of blood alcohol of eight one-hundredths or greater, or while under the influence of intoxicating liquor in violation of subsection (b) of said section 24G, section 24L or subsection (a) of section 8 of chapter 90B, section 8A or 8B of said chapter 90B, or section 131/2 of chapter 265 or a like violation by a court of any other jurisdiction or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction for a like offense shall have his license or right to operate suspended forthwith for a period of 3 years for such refusal; provided, further, that any person previously convicted of, or assigned to a program for, 2 such violations shall have the person's license or right to operate suspended forthwith for a period of 5 years for such refusal; and provided, further, that a person previously convicted of, or assigned to a program for, 3 or more such violations shall have the person's license or right to operate suspended forthwith for life based upon such refusal. If a person refuses to submit to any such test or analysis after having been convicted of a violation of section 24L, the restistrar shall suspend his license or right to operate for 10 years. If a person refuses to submit to any such test or analysis after having been convicted of a violation of subsection (a) of section 24G, operating a motor vehicle with a percentage by weight of blood alcohol of eight one-hundredths or greater, or while under the influence of intoxicating liquor in violation of subsection (b) of said section 24G, or section 131/2 of chapter 265, the registrar shall revoke his license or right to operate for life. If a person refuses to take a test under this paragraph, the police officer shall:

(i) immediately, on behalf of the registrar, take custody of such person's license or right to operate issued by the commonwealth;

(ii) provide to each person who refuses such test, on behalf of the registrar, a written notification of suspension in a format approved by the registrar; and

(iii) impound the vehicle being driven by the operator and arrange for the vehicle to be impounded for a period of 12 hours after the operator's refusal, with the costs for the towing, storage and maintenance of the vehicle to be borne by the operator.

The police officer before whom such refusal was made shall, within 24 hours, prepare a report of such refusal. Each report shall be made in a format approved by the registrar and shall be made under the penalties of perjury by the police officer before whom such refusal was made. Each report shall set forth the grounds for the officer's belief that the person arrested had been operating a motor vehicle on a way or place while under the influence of intoxicating liquor, and shall state that such person had refused to submit to a chemical test or analysis when requested by the officer to do so, such refusal having been witnessed by another person other than the defendant. Each report shall identify the police officer who requested the chemical test or analysis and the other person witnessing the refusal. Each report shall be sent forthwith to the registrar along with a copy of the notice of intent to suspend in a form, including electronic or otherwise, that the registrar deems appropriate. A license or right to operate which has been confiscated pursuant to this subparagraph shall be forwarded to the registrar forthwith. The report shall constitute prima facie evidence of the facts set forth therein at any administrative hearing regarding the suspension specified in this section.

The suspension of a license or right to operate shall become effective immediately upon receipt of the notification of suspension from the police officer. A suspension for a refusal of either a chemical test or analysis of breath or blood shall run consecutively and not concurrently, both as to any additional suspension periods arising from the same incident, and as to each other.

No license or right to operate shall be restored under any circumstances and no restricted or hardship permits shall be issued during the suspension period imposed by this paragraph; provided, however, that the defendant may immediately, upon the entry of a not guilty finding or dismissal of all charges under this section, section 24G, section 24L, or section 131/2 of chapter 265, and in the absence of any other alcohol related charges pending against said defendant, apply for and be immediately granted a hearing before the court which took final action on the charges for the purpose of requesting the restoration of said license. At said hearing, there shall be a rebuttable presumption that said license be restored, unless the commonwealth shall establish, by a fair preponderance of the evidence, that restoration of said license would likely endanger the public safety. In all such instances, the court shall issue written findings of fact with its decision.

(2) If a person's blood alcohol percentage is not less than eight one-hundredths or the person is under twenty-one years of age and his blood alcohol percentage is not less than two one-hundredths, such police officer shall do the following:

(i) immediately and on behalf of the registrar take custody of such person's drivers license or permit issued by the commonwealth;

(ii) provide to each person who refuses the test, on behalf of the registrar, a written notification of suspension, in a format approved by the registrar; and

(iii) immediately report action taken under this paragraph to the registrar. Each report shall

be made in a format approved by the registrar and shall be made under the penalties of perjury by the police officer. Each report shall set forth the grounds for the officer's belief that the person arrested has been operating a motor vehicle on any way or place while under the influence of intoxicating liquor and that the person's blood alcohol percentage was not less than .08 or that the person was under 21 years of age at the time of the arrest and whose blood alcohol percentage was not less than .02. The report shall indicate that the person was administered a test or analysis, that the operator administering the test or analysis was trained and certified in the administration of the test or analysis, that the test was performed in accordance with the regulations and standards promulgated by the secretary of public safety, that the equipment used for the test was regularly serviced and maintained and that the person administering the test had every reason to believe the equipment was functioning properly at the time the test was administered. Each report shall be sent forthwith to the registrar along with a copy of the notice of intent to suspend, in a form, including electronic or otherwise, that the registrar deems appropriate. A license or right to operate confiscated under this clause shall be forwarded to the registrar forthwith.

The license suspension shall become effective immediately upon receipt by the offender of the notice of intent to suspend from a police officer. The license to operate a motor vehicle shall remain suspended until the disposition of the offense for which the person is being prosecuted, but in no event shall such suspension pursuant to this subparagraph exceed 30 days.

In any instance where a defendant is under the age of twenty-one years and such evidence is that the percentage, by weight, of alcohol in the defendant's blood is two one-hundredths or greater and upon the failure of any police officer pursuant to this subparagraph, to suspend or take custody of the driver's license or permit issued by the commonwealth, and, in the absence of a complaint alleging a violation of paragraph (a) of subdivision (1) or a violation of section twenty-four G or twenty-four L, the registrar shall administratively suspend the defendant's license or right to operate a motor vehicle upon receipt of a report from the police officer who administered such chemical test or analysis of the defendant's blood pursuant to subparagraph (1). Each such report shall be made on a form approved by the registrar and shall be sworn to under the penalties of perjury by such police officer. Each such report shall set forth the grounds for the officer's belief that the person arrested had been operating a motor vehicle on a way or place while under the influence of intoxicating liquor and that such person was under twenty-one years of age at the time of the arrest and whose blood alcohol percentage was two one-hundredths or greater. Such report shall also state that the person was administered such a test or analysis, that the operator administering the test or analysis was trained and certified in the administration of such test, that the test was performed in accordance with the regulations and standards promulgated by the secretary of public safety, that the equipment used for such test was regularly serviced and maintained, and that the person administering the test had every reason to believe that the equipment was functioning properly at the time the test was administered. Each such report shall be endorsed by the police chief as defined in section one of chapter ninety C, or by the person authorized by him, and shall be sent to the registrar along with the confiscated license or permit not later than ten days from the date that such chemical test or

analysis of the defendant's blood was administered. The license to operate a motor vehicle shall thereupon be suspended in accordance with section twenty-four P.

(g) Any person whose license, permit or right to operate has been suspended under subparagraph (1) of paragraph (f) shall, within fifteen days of suspension, be entitled to a hearing before the registrar which shall be limited to the following issues: (i) did the police officer have reasonable grounds to believe that such person had been operating a motor vehicle while under the influence of intoxicating liquor upon any way or in any place to which members of the public have a right of access or upon any way to which members of the public have a right of access as invitees or licensees, (ii) was such person placed under arrest, and (iii) did such person refuse to submit to such test or analysis. If, after such hearing, the registrar finds on any one of the said issues in the negative, the registrar shall forthwith reinstate such license, permit or right to operate. The registrar shall create and preserve a record at said hearing for judicial review. Within thirty days of the issuance of the final determination by the registrar following a hearing under this paragraph, a person aggrieved by the determination shall have the right to file a petition in the district court for the judicial district in which the offense occurred for judicial review. The filing of a petition for judicial review shall not stay the revocation or suspension. The filing of a petition for judicial review shall be had as soon as possible following the submission of said request, but not later than thirty days following the submission thereof. Review by the court shall be on the record established at the hearing before the registrar. If the court finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is unsupported by the evidence in the record, the court may reverse the registrar's determination.

Any person whose license or right to operate has been suspended pursuant to subparagraph (2) of paragraph (f) on the basis of chemical analysis of his breath may within ten days of such suspension request a hearing and upon such request shall be entitled to a hearing before the court in which the underlying charges are pending or if the individual is under the age of twenty-one and there are no pending charges, in the district court having jurisdiction where the arrest occurred, which hearing shall be limited to the following issue; whether a blood test administered pursuant to paragraph (e) within a reasonable period of time after such chemical analysis of his breath, shows that the percentage, by weight, of alcohol in such person's blood was less than eight one-hundredths or, relative to such person under the age of twenty-one was less than two one-hundredths. If the court finds that such a blood test shows that such percentage was less than eight one-hundredths or, relative to such person under the age of twenty-one, that such percentage was less than two one-hundredths, the court shall restore such person's license, permit or right to operate and shall direct the prosecuting officer to forthwith notify the department of criminal justice information services and the registrar of such restoration.

(h) Any person convicted of a violation of subparagraph (1) of paragraph (a) that involves operating a motor vehicle while under the influence of marihuana, narcotic drugs,

depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue, may, as part of the disposition in the case, be ordered to participate in a driver education program or a drug treatment or drug rehabilitation program, or any combination of said programs. The court shall set such financial and other terms for the participation of the defendant as it deems appropriate.

(2) (a) Whoever upon any way or in any place to which the public has a right of access, or any place to which members of the public have access as invitees or licensees, operates a motor vehicle recklessly, or operates such a vehicle negligently so that the lives or safety of the public might be endangered, or upon a bet or wager or in a race, or whoever operates a motor vehicle for the purpose of making a record and thereby violates any provision of section seventeen or any regulation under section eighteen, or whoever without stopping and making known his name, residence and the register number of his motor vehicle goes away after knowingly colliding with or otherwise causing injury to any other vehicle or property, or whoever loans or knowingly permits his license or learner's permit to operate motor vehicles to be used by any person, or whoever makes false statements in an application for such a license or learner's permit, or whoever knowingly makes any false statement in an application for registration of a motor vehicle or whoever while operating a motor vehicle in violation of section 8M, 12A or 13B, such violation proved beyond a reasonable doubt, is the proximate cause of injury to any other person, vehicle or property by operating said motor vehicle negligently so that the lives or safety of the public might be endangered, shall be punished by a fine of not less than twenty dollars nor more than two hundred dollars or by imprisonment for not less than two weeks nor more than two years, or both; and whoever uses a motor vehicle without authority knowing that such use is unauthorized shall, for the first offense be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment for not less than thirty days nor more than two years, or both, and for a second offense by imprisonment in the state prison for not more than five years or in a house of correction for not less than thirty days nor more than two and one half years, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment; and whoever is found guilty of a third or subsequent offense of such use without authority committed within five years of the earliest of his two most recent prior offenses shall be punished by a fine of not less than two hundred dollars nor more than one thousand dollars or by imprisonment for not less than six months nor more than two and one half years in a house of correction or for not less than two and one half years nor more than five years in the state prison or by both fine and imprisonment. A summons may be issued instead of a warrant for arrest upon a complaint for a violation of any provision of this paragraph if in the judgment of the court or justice receiving the complaint there is reason to believe that the defendant will appear upon a summons.

[Second paragraph of paragraph (a) of subdivision (2) effective until March 1, 2014. For text effective March 1, 2014, see below.]

There shall be an assessment of $250 against a person who, by a court of the commonwealth, is convicted of, is placed on probation for or is granted a continuance without a finding for or otherwise pleads guilty to or admits to a finding of sufficient facts of operating

a motor vehicle negligently so that the lives or safety of the public might be endangered under this section, but $187.50 of the $250 collected under this assessment shall be deposited monthly by the court with the state treasurer, who shall deposit it in the Head Injury Treatment Services Trust Fund, and the remaining amount of the assessment shall be credited to the General Fund. The assessment shall not be subject to reduction or waiver by the court for any reason.

[Second paragraph of paragraph (a) of subdivision (2) as amended by 2013, 38, Sec. 80 effective March 1, 2014. See 2013, 38, Sec. 214. For text effective until March 1, 2014, see above.]

There shall be an assessment of $250 against a person who, by a court of the commonwealth, is convicted of, is placed on probation for or is granted a continuance without a finding for or otherwise pleads guilty to or admits to a finding of sufficient facts of operating a motor vehicle negligently so that the lives or safety of the public might be endangered under this section, but $250 of the $250 collected under this assessment shall be deposited monthly by the court with the state treasurer, who shall deposit it in the Head Injury Treatment Services Trust Fund, and the remaining amount of the assessment shall be credited to the General Fund. The assessment shall not be subject to reduction or waiver by the court for any reason.

(a1/2) (1) Whoever operates a motor vehicle upon any way or in any place to which the public has right of access, or upon any way or in any place to which members of the public shall have access as invitees or licensees, and without stopping and making known his name, residence and the registration number of his motor vehicle, goes away after knowingly colliding with or otherwise causing injury to any person not resulting in the death of any person, shall be punished by imprisonment for not less than six months nor more than two years and by a fine of not less than five hundred dollars nor more than one thousand dollars.

(2) Whoever operates a motor vehicle upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public shall have access as invitees or licensees and without stopping and making known his name, residence and the registration number of his motor vehicle, goes away to avoid prosecution or evade apprehension after knowingly colliding with or otherwise causing injury to any person shall, if the injuries result in the death of a person, be punished by imprisonment in the state prison for not less than two and one-half years nor more than ten years and by a fine of not less than one thousand dollars nor more than five thousand dollars or by imprisonment in a jail or house of correction for not less than one year nor more than two and one-half years and by a fine of not less than one thousand dollars nor more than five thousand dollars. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this paragraph be eligible for probation, parole, or furlough or receive any deduction from his sentence until such person has served at least one year of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender

committed under this paragraph, a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution or to engage in employment pursuant to a work release program.

(3) Prosecutions commenced under subparagraph (1) or (2) shall not be continued without a finding nor placed on file.

(b) A conviction of a violation of paragraph (a) or paragraph (a1/2) of subdivision (2) of this section shall be reported forthwith by the court or magistrate to the registrar, who may in any event, and shall unless the court or magistrate recommends otherwise, revoke immediately the license or right to operate of the person so convicted, and no appeal, motion for new trial or exceptions shall operate to stay the revocation of the license or right to operate. If it appears by the records of the registrar that the person so convicted is the owner of a motor vehicle or has exclusive control of any motor vehicle as a manufacturer or dealer or otherwise, the registrar may revoke the certificate of registration of any or all motor vehicles so owned or exclusively controlled.

(c) The registrar, after having revoked the license or right to operate of any person under paragraph (b), in his discretion may issue a new license or reinstate the right to operate to him, if the prosecution has terminated in favor of the defendant. In addition, the registrar may, after an investigation or upon hearing, issue a new license or reinstate the right to operate to a person convicted in any court for a violation of any provision of paragraph (a) or (a1/2) of subdivision (2); provided, however, that no new license or right to operate shall be issued by the registrar to: (i) any person convicted of a violation of subparagraph (1) of paragraph (a1/2) until one year after the date of revocation following his conviction if for a first offense, or until two years after the date of revocation following any subsequent conviction; (ii) any person convicted of a violation of subparagraph (2) of paragraph (a1/2) until three years after the date of revocation following his conviction if for a first offense or until ten years after the date of revocation following any subsequent conviction; (iii) any person convicted, under paragraph (a) of using a motor vehicle knowing that such use is unauthorized, until one year after the date of revocation following his conviction if for a first offense or until three years after the date of revocation following any subsequent conviction; and (iv) any person convicted of any other provision of paragraph (a) until sixty days after the date of his original conviction if for a first offense or one year after the date of revocation following any subsequent conviction within a period of three years. Notwithstanding the forgoing, a person holding a junior operator's license who is convicted of operating a motor vehicle recklessly or negligently under paragraph (a) shall not be eligible for license reinstatement until 180 days after the date of his original conviction for a first offense or 1 year after the date of revocation following a subsequent conviction within a period of 3 years. The registrar, after investigation, may at any time rescind the revocation of a license or right to operate revoked because of a conviction of operating a motor vehicle upon any way or in any place to which the public has a right of access or any place to which members of the public have access as invitees or licensees negligently so that the lives or safety of the public might be endangered. The provisions of this paragraph shall apply in the same manner to

juveniles adjudicated under the provisions of section fifty-eight B of chapter one hundred and nineteen.

(3) The prosecution of any person for the violation of any provision of this section, if a subsequent offence, shall not, unless the interests of justice require such disposition, be placed on file or otherwise disposed of except by trial, judgment and sentence according to the regular course of criminal proceedings; and such a prosecution shall be otherwise disposed of only on motion in writing stating specifically the reasons therefor and verified by affidavits if facts are relied upon. If the court or magistrate certifies in writing that he is satisfied that the reasons relied upon are sufficient and that the interests of justice require the allowance of the motion, the motion shall be allowed and the certificate shall be filed in the case. A copy of the motion and certificate shall be sent by the court or magistrate forthwith to the registrar.

(4) In any prosecution commenced pursuant to this section, introduction into evidence of a prior conviction or prior finding of sufficient facts by either original court papers or certified attested copy of original court papers, accompanied by a certified attested copy of the biographical and informational data from official probation office records, shall be prima facie evidence that a defendant has been convicted previously or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program because of a like offense by a court of the commonwealth one or more times preceding the date of commission of the offense for which said defendant is being prosecuted.

2.13: continued

(2) An arrestee who has been offered a breath test and who consents to submit to a breath test, shall be administered a breath test using a certified breath test device within a reasonable period of time.

(3) The BTO shall observe the arrestee for no less than 15 minutes immediately prior to the administration of the breath test. If the BTO has reason to believe the arrestee has introduced any item into his or her mouth, the 15 minute observation period shall be restarted. Also, if during the test sequence, the breath test device reports the presence of mouth alcohol, the test sequence shall end. The 15 minute observation period shall be restarted and a new test sequence shall be started. This observation period is designed to allow the dissipation of mouth alcohol.

(4) The breath test shall be valid and the results admissible in a court of law if it complies with 501 CMR 2.14.

2.14: Administration of a Breath Test: Procedures

(1) The arrestee's consent to a breath test shall be documented by the arresting officer or the BTO.
(2) The breath test shall be administered by a certified BTO on a certified breath test device as defined in 501 CMR 2.02.
(3) The breath test shall consist of a multipart sequence consisting of:
(a) one adequate breath sample analysis;
(b) one calibration standard analysis; and
(c) a second adequate breath sample analysis.
(4) If the sequence described in 501 CMR 2.14(3) does not result in breath samples that are within ± 0.02% blood alcohol content units, a new breath test sequence shall begin.

2.15: Breath Test Results

(1) The results of the analysis of each breath sample and calibration standard shall be reported to at least two decimal places if the test was administered using a liquid calibration standard. The results of the analysis of each breath sample and calibration standard shall be reported in three decimal places, if the calibration standard is gas.
(2) For the purpose of determining the arrestee's BAC pursuant to M.G.L. c. 90 § 24:
(a) if the two breath sample results are the same, that result shall be truncated to two decimal places and reported as the arrestee's BAC; otherwise
(b) the lower of the two breath sample results shall be truncated to two decimal places and reported as the arrestee's BAC.

2.16: Breath Test Refusal

If after being advised of his or her rights and the consequences of refusing to take a breath test, the arrestee refuses to submit to a breath test, none shall be given. The Registry of Motor Vehicles (RMV) shall be notified of such refusal in a format approved by the Registrar. If at any time following an arrestee's initial consent to the breath test and prior to the successful completion of the test, the arrestee refuses to participate or declines to cooperate, the test shall be terminated and it shall be noted as a refusal. If the arrestee fails to supply the required breath samples upon request, the test shall be terminated and it shall be noted as a refusal.

Section 403. Grounds for Excluding Relevant Evidence

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, being unnecessarily time consuming, or needless presentation of cumulative evidence.

NOTE

This section is derived from Ruszcyk v. Secretary of Pub. Safety, 401 Mass. 418, 423, 517 N.E.2d 152, 155 (1988) (adopting the principles expressed in Proposed Mass. R. Evid. 403). See Commonwealth v. Bonds, 445 Mass. 821, 831, 840 N.E.2d 939, 948 (2006); Gath v. M/A-Com, Inc., 440 Mass. 482, 490–491, 802 N.E.2d 521, 529 (2003); Commonwealth v. Beausoleil, 397 Mass. 206, 217, 490 N.E.2d 788, 795 (1986); Commonwealth v. Cruz, 53 Mass. App. Ct. 393, 407–408, 759 N.E.2d 723, 736 (2001).

While a majority of the cases stand for the proposition that relevant evidence may be excluded if its probative value is "substantially" outweighed by its prejudicial effect—see, e.g., Commonwealth v. Bonds, 445 Mass. at 831, 840 N.E.2d at 948; Commonwealth v. Stroyny, 435 Mass. 635, 641, 760 N.E.2d 1201, 1208 (2002); Commonwealth v. Otsuki, 411 Mass. 218, 236, 581 N.E.2d 999, 1009–1010 (1991)—others state that the probative value must be merely outweighed by the prejudicial effect. See, e.g., Commonwealth v. Rosario, 444 Mass. 550, 557, 829 N.E.2d 1135, 1140 (2005); Commonwealth v. Reynolds, 429 Mass. 388, 395, 708 N.E.2d 658, 665 (1999). These latter cases, however, rely on cases which include the term "substantial" when explaining the balancing test. See, e.g., Commonwealth v. Chalifoux, 362 Mass. 811, 816, 291 N.E.2d 635, 638 (1973) (relied on by cases which Commonwealth v. Rosario, 444 Mass. at 556–557, 829 N.E.2d at 1140–1141, relied on); Commonwealth v. Otsuki, 411 Mass. at 236, 581 N.E.2d at 1009–1010 (relied on by Commonwealth v. Reynolds, 429 Mass. at 395, 708 N.E.2d at 665).

Guidelines for Certain Categories of Evidence. The Supreme Judicial Court and Appeals Court have developed guidelines for the admissibility of certain categories of evidence subject to a Section 403 analysis. See, e.g., Santos v. Chrysler Corp., 430 Mass. 198, 202–203, 715 N.E.2d 47, 52–53 (1999) (similar incidents); Ruszcyk v. Secretary of Pub. Safety, 401 Mass. 418, 422–423, 517 N.E.2d 152, 155 (1998) (vicarious admissions); Commonwealth v. Ramos, 406 Mass. 397, 406–407, 548 N.E.2d 856, 861–862 (1990) (in a prosecution for murder in the first degree by reason of deliberate premeditation and extreme atrocity or cruelty, "photographs indicating the force applied and portraying the injuries inflicted may properly be admitted"); Commonwealth v. Trainor, 374 Mass. 796, 802–806, 374 N.E.2d 1216, 1220–1222 (1978) (admissibility of opinion polls and surveys); Commonwealth v. Perryman, 55 Mass. App. Ct. 187, 193–195, 770 N.E.2d 1, 5–7 (2002) (admissibility of evidence consisting of courtroom experiments and demonstrations).

Unfair Prejudice. "[T]rial judges must take care to avoid exposing the jury unnecessarily to inflammatory material that might inflame the jurors' emotions and possibly deprive the defendant of an impartial jury." Commonwealth v. Berry, 420 Mass. 95, 109, 648 N.E.2d 732, 741 (1995). See, e.g., Commonwealth v. Bishop, 461 Mass. 586, 596–597, 963 N.E.2d 88, 97 (2012) ("before a judge admits evidence that a defendant used [a racial slur] to describe a man of color, the judge must be convinced that the probative weight of such evidence justifies this risk"). Unfair prejudice also results when the trier of fact uses properly admitted evidence for an impermissible purpose, for example by relying on the truth of an out-of-court statement that was admitted for a nonhearsay purpose or, when evidence of a person's prior bad act is admitted under Section 404(b), by considering that evidence as indicating that person's propensity to commit such acts. See, e.g., Commonwealth v. Rosario, 430 Mass. 505, 509–510, 721 N.E.2d 903, 907 (1999); Commonwealth v. Fidalgo, 74 Mass. App. Ct. 130, 133, 904 N.E.2d 474, 477 (2009).

In balancing probative value against risk of prejudice, the fact that the evidence goes to a central issue in the case weighs in favor of admission. See Gath v. M/A-Com, Inc., 440 Mass. 482, 490–491, 802 N.E.2d 521, 529 (2003). Unfair prejudice does not mean that the evidence sought to be excluded is particularly probative evidence harmful to the opponent of the evidence. An illustrative weighing of probative value against unfair prejudice arises regarding the admissibility of photographs of the victim (especially autopsy) or the crime scene. See generally Commonwealth v. Anderson, 445 Mass. 195, 208–209, 834 N.E.2d 1159, 1170–1171 (2005); Commonwealth v. Lyons, 444 Mass. 289, 297–298, 828 N.E.2d 1, 8–9 (2005); Commonwealth v. Prashaw, 57 Mass. App. Ct. 19, 24–25, 781 N.E.2d 19, 24 (2003). Evidence of a defendant's prior bad act may be unfairly prejudicial and therefore inadmissible to prove the crime charged, but it may be admissible for other purposes (e.g., common plan, pattern of conduct, identity, absence of accident, motive). See Commonwealth v. Holloway, 44 Mass. App. Ct. 469, 475, 691 N.E.2d 985, 990 (1998). See also Commonwealth v. Fidalgo, 74 Mass. App. Ct. 130, 133–134, 904 N.E.2d 474, 478 (2009) (evidence that the defendant had been a passenger in three prior automobile accidents over the past nine years in which she had claimed injuries and sought damages was not relevant in a prosecution of the defendant for filing a false motor vehicle insurance claim because it showed nothing about the character of the prior claims and yet had the potential for prejudice since the case was essentially a credibility contest). The effectiveness of limiting instructions in minimizing the risk of unfair prejudice should be considered in the balance. Commonwealth v. Dunn, 407 Mass. 798, 807, 556 N.E.2d 30, 35–36 (1990). See also Section 404(b), Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes: Other Crimes, Wrongs, or Acts.

Confusion of Issues and Misleading the Jury. The trial judge has discretion to exclude relevant evidence if it has potential for confusing and misleading the fact finder. Commonwealth v. Rosa, 422 Mass. 18, 25, 661 N.E.2d 56, 61 (1996); Commonwealth v. Beausoleil, 397 Mass. 206, 217, 490 N.E.2d 788, 795 (1986); Lally v. Volkswagen Aktiengesellschaft, 45 Mass. App. Ct. 317, 332, 698 N.E.2d 28, 41 (1998) (admissibility of a test, experiment, or reenactment requires consideration of "whether the evidence is relevant, the extent to which the test conditions are similar to the circumstances surrounding the accident, and whether the [experiment, demonstration, or reenactment] will confuse or mislead the jury" [quotation and citation omitted]).

Unnecessarily Time Consuming. The trial judge has discretion to exclude evidence if it is unduly time consuming. Commonwealth v. Cruz, 53 Mass. App. Ct. 393, 407–408, 759 N.E.2d 723, 736 (2001).

Cumulative Evidence. The trial judge has discretion to exclude evidence if it is merely tive. Commonwealth v. Bonds, 445 Mass. 821, 831, 840 N.E.2d 939, 948 (2006). See Fitchburg Gas & Elec. Light Co. v. Department of Telecomm. & Energy, 440 Mass. 625, 641, 801 N.E.2d 220, 232 (2004) (no error in excluding testimony that would be "merely cumulative of the uncontroverted evidence"); Commonwealth v. Taghizadeh, 28 Mass. App. Ct. 52, 60–61, 545 N.E.2d 1195, 1200–1201 (1989) (evidence that is relevant to an essential element of a crime, claim, or defense is not cumulative and subject to exclusion simply because an opposing party offers to stipulate to the fact at issue). See also Old Chief v. United States, 519 U.S. 172 (1997).

Exclusion as a Sanction. See Section 1102, Spoliation or Destruction of Evidence.

Constitutional Considerations. In a criminal case, the defendant has a constitutional right to present a complete defense; however, this right does not deprive the trial judge of discretion to exclude evidence that is repetitive, only marginally relevant, or that creates an undue risk of unfair prejudice or confusion of the issues. See Commonwealth v. Kartell, 58 Mass. App. Ct. 428, 433 n.2, 790 N.E.2d 739, 743 n.2 (2003). See also Commonwealth v. Carroll, 439 Mass. 547, 552, 789 N.E.2d 1062, 1067 (2003); Commonwealth v. Edgerly, 372 Mass. 337, 343, 361 N.E.2d 1289, 1292 (1977).

Section 801. Definitions

The following definitions apply under this Article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. The following statements are not hearsay and are admissible for the truth of the matter asserted:

(1) Prior Statement by Witness.

(A) Prior Inconsistent Statement Made Under Oath or Penalty of Perjury at Certain Proceedings. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement which is (i) inconsistent with the declarant's testimony; (ii) made under oath before a grand jury, or at an earlier trial, a probable cause hearing, or a deposition, or in an affidavit made under the penalty of perjury in a G. L. c. 209A proceeding; (iii) not coerced; and (iv) more than a mere confirmation or denial of an allegation by the interrogator.

(B) [For a discussion of prior consistent statements, which are not admissible substantively under Massachusetts law, see Section 613(b), Prior Statements of Witnesses, Limited Admissibility: Prior Consistent Statements.]

(C) Identification. A statement of identification made after perceiving the person if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement.

(2) Admission by Party-Opponent. The following statements offered against a party are not excluded by the hearsay rule:

(A) The party's own statement.

(B) A statement of which the party has manifested an adoption or belief in its truth.

(C) A statement by a party's agent or servant admitted against the principal to prove the truth of facts asserted in it as though made by the principal, if the agent was authorized to make the statement or was authorized to make, on the principal's behalf, true statements concerning the subject matter.

(D) A statement by a party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

(E) A statement of a coconspirator or joint venturer made during the pendency of the cooperative effort and in furtherance of its goal when the existence of the conspiracy or joint venture is shown by evidence independent of the statement.

NOTE

Subsection (a). This subsection is taken nearly verbatim from Commonwealth v. Baker, 20 Mass. App. Ct. 926, 928 n.3, 479 N.E.2d 193, 195 n.3 (1985), quoting with approval the definition of a "statement" contained in Fed. R. Evid. 801(a) and Proposed Mass. R. Evid. 801(a).

To be hearsay, the statement, whether verbal or nonverbal, must be intended as an assertion. See Bacon v. Charlton, 61 Mass. 581, 586 (1851) (distinguishing between groans and exclamations of pain, which are not hearsay, and anything in the nature of narration or statement).

"[C]onduct can serve as a substitute for words, and to the extent it communicates a message, hearsay considerations apply." Commonwealth v. Gonzalez, 443 Mass. 799, 803, 824 N.E.2d 843, 848 (2005). "[O]ut-of-court conduct, which by intent or inference expresses an assertion, has been regarded as a statement and therefore hearsay if offered to prove the truth of the matter asserted. See Bartlett v. Emerson, [73 Mass. 174, 175–176] (1856) (act of pointing out boundary marker inadmissible hearsay)." Opinion of the Justices, 412 Mass. 1201, 1209, 591 N.E.2d 1073, 1077 (1992) (legislation that would permit the Commonwealth to admit evidence of a person's refusal to take a breathalyzer test violates the privilege against self-incrimination because it reveals the person's thought process and is thus tantamount to an assertion).

Subsection (b). This subsection is identical to Fed. R. Evid. 801(b). While no Massachusetts case has defined "declarant," the term has been commonly used in Massachusetts case law to mean a person who makes a statement. See, e.g., Commonwealth v. DeOliveira, 447 Mass. 56, 57–58, 849 N.E.2d 218, 221 (2006); Commonwealth v. Zagranski, 408 Mass. 278, 285, 558 N.E.2d 933, 938 (1990). See also Webster's Third New International Dictionary 586 (2002), which defines "declarant" as a person "who makes a declaration" and "declaration" as "a statement made or testimony given by a witness."

Subsection (c). This subsection is derived from Commonwealth v. Cohen, 412 Mass. 375, 393, 589 N.E.2d 289, 301 (1992), quoting McCormick, Evidence § 246, at 729 (3d ed. 1984), and Fed. R. Evid. 801(c). See Commonwealth v. Cordle, 404 Mass. 733, 743, 537 N.E.2d 130, 136 (1989); Commonwealth v. Randall, 50 Mass. App. Ct. 26, 27, 733 N.E.2d 579, 581 (2000). See also Commonwealth v. Silanskas, 433 Mass. 678, 693, 746 N.E.2d 445, 460 (2001) ("Hearsay is an out-of-court statement offered to prove the truth of the matter asserted"); G.E.B. v. S.R.W., 422 Mass. 158, 168, 661 N.E.2d 646, 654 (1996) ("Hearsay is an 'extrajudicial statement offered to prove the truth of the matter asserted'"), quoting Commonwealth v. Keizer, 377 Mass. 264, 269 n.4, 385 N.E.2d 1001, 1004 n.4 (1979); Commonwealth v. DelValle, 351 Mass. 489, 491, 221 N.E.2d 922, 923 (1966) ("The broad rule on hearsay evidence interdicts the admission of a statement made out of court which is offered to prove the truth of what it asserted"). If a witness at trial affirms the truth of a statement made out-of-court, the witness adopts it and it is not hearsay. Commonwealth v. Sanders, 451 Mass. 290, 302 n.8, 885 N.E.2d 105, 117 n.8 (2008). Whether the witness has adopted his or her out-of-court statement is a question of fact for the jury and not a preliminary question for the judge. Id. at 302, 885 N.E.2d at 117.

"The theory which underlies exclusion is that with the declarant absent the trier of fact is forced to rely upon the declarant's memory, truthfulness, perception, and use of language not subject to cross-examination." Commonwealth v. DelValle, 351 Mass. at 491, 221 N.E.2d at 923.

Evidence Admitted for Nonhearsay Purpose. "The hearsay rule forbids only the testimonial use of reported statements." Commonwealth v. Miller, 361 Mass. 644, 659, 282 N.E.2d 394, 404 (1972). Accord Commonwealth v. Fiore, 364 Mass. 819, 824, 308 N.E.2d 902, 907 (1974), quoting Wigmore, Evidence § 1766 (3d ed. 1940) (out-of-court utterances are hearsay only when offered "for a special purpose, namely,

as assertions to evidence the truth of the matter asserted"). Thus, when out-of-court statements are offered for a reason other than to prove the truth of the matter asserted or when they have independent legal significance, they are not hearsay. There are many nonhearsay purposes for which out-of-court statements may be offered, such as the following:

- ***Proof of "Verbal Acts" or "Operative" Words.*** See Commonwealth v. McLaughlin, 431 Mass. 241, 246, 726 N.E.2d 959, 964 (2000) ("[e]vidence of the terms of that oral agreement was not offered for the truth of the matters asserted, but as proof of an 'operative' statement, i.e., existence of a conspiracy"); Charette v. Burke, 300 Mass. 278, 280–281, 15 N.E.2d 194, 195–196 (1938) (father's remark to a child before leaving the child to go into the house ["Wait where you are while I go inside to get you a cookie"] was a "verbal act" and not hearsay); Shimer v. Foley, Hoag & Eliot, LLP, 59 Mass. App. Ct. 302, 310, 795 N.E.2d 599, 605–606 (2003) (evidence of the terms of a contract used to establish lost profits is not hearsay because it is not an assertion).
- ***To Show Notice or Other Effect on Hearer.*** See Pardo v. General Hosp. Corp., 446 Mass. 1, 18–19, 841 N.E.2d 692, 705 (2006) (memorandum admissible to show notice); A.W. Chesterton Co. v. Massachusetts Insurers Insolvency Fund, 445 Mass. 502, 515–516, 838 N.E.2d 1237, 1248 (2005) (knowledge of insurance reserves not listed in response to question on insurance application regarding potential losses); Commonwealth v. Bregoli, 431 Mass. 265, 273, 727 N.E.2d 59, 68 (2000) (other declarants' knowledge of facts relating to crime to rebut Commonwealth's claim that only killer would be aware of facts); Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 17, 696 N.E.2d 909, 920 (1998) (other complaints about product admissible as evidence that manufacturer was on notice of defect); Mailhiot v. Liberty Bank & Trust Co., 24 Mass. App. Ct. 525, 529 n.5, 510 N.E.2d 773, 778 n.5 (1987) (instructions given to the plaintiff by bank examiners about how to handle a problem were not assertions and thus not hearsay). Cf. Commonwealth v. Daley, 55 Mass. App. Ct. 88, 94 n.9, 769 N.E.2d 322, 328 n.9 (2002) (a passerby's remark ["Hey, are you all right?"], if offered as an assertion that the victim was in distress, would be hearsay, but if offered to explain why the defendant fled, and thus not as an assertion, would not be hearsay), S.C., 439 Mass. 558, 789 N.E.2d 1070 (2003).
- ***To Show "the State of Police Knowledge."*** Out-of-court statements to a police investigator may sometimes be admitted for the nonhearsay purpose of showing "the state of police knowledge," because "an arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct." Commonwealth v. Cohen, 412 Mass. 375, 393, 589 N.E.2d 289, 301 (1992). See Commonwealth v. Miller, 361 Mass. 644, 659, 282 N.E.2d 394, 403–404 (1972) (out-of-court statements are admissible when offered to explain why police approached defendant to avoid misimpression that police acted arbitrarily in singling out defendant for investigation). However, "[t]estimony of this kind carries a high probability of misuse, because a witness may relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports[,] even when not necessary to show state of police knowledge." Commonwealth v. Rosario, 430 Mass. 505, 510, 721 N.E.2d 903, 906 (1999) (quotation omitted). Such evidence, therefore, (1) is permitted only through the testimony of a police officer, who must testify only on the basis of his or her own knowledge; (2) is limited to the facts required to establish the officer's state of knowledge; (3) is allowed only when the police action or state of police knowledge is relevant to an issue in the case. Id. at 509–510, 721 N.E.2d at 908. Cross-Reference: Section 105, Limited Admissibility.
- ***As Circumstantial Evidence of Declarant's State of Mind.*** Where the declarant asserts his or her own state of mind (usually by words describing the state of mind), the statement is hearsay and is admissible only if it falls within the hearsay exception. See Section 803(3)(B), Hearsay Exceptions; Availability of Declarant Immaterial: Then Existing Mental, Emotional, or Physical Condition, and the accompanying note. However, when the statement conveys the speaker's state of mind only circumstantially (usually because the words themselves do not describe the state of mind directly), it is not hearsay. See, e.g., Commonwealth v. Romero, 464 Mass. 648,

652 n.5, 984 N.E.2d 853, 855 n.5 (2013) (defendant's statement that passenger in his vehicle had shown him a gun was admissible to show defendant's knowledge that gun was in car, as well as being admission of a party-opponent); Commonwealth v. Montanez, 439 Mass. 441, 447–448, 788 N.E.2d 954, 960–961 (2003) (evidence of victim's statement to her friend was properly admitted to establish victim's state of mind [concern for her family's shame and diminished economic circumstances if abuser were removed from her home], which helped explain her delay in reporting an episode of sexual abuse and thus was not hearsay). Contrast Section 803(3)(B)(ii), Hearsay Exceptions; Availability of Declarant Immaterial: Then Existing Mental, Emotional, or Physical Condition.

- ***As Circumstantial Evidence of the Nature of a Place or a Thing.*** Sometimes out-of-court statements that do not directly describe the nature or character of a place or an object can nevertheless be probative of that nature or character. In such cases, the statements are treated as nonhearsay. See, e.g., Commonwealth v. Massod, 350 Mass. 745, 748, 217 N.E.2d 191, 193 (1996) (statements over telephone not hearsay when used to show that telephone was apparatus used for registering bets on horse races); Commonwealth v. DePina, 75 Mass. App. Ct. 842, 850, 917 N.E.2d 781, 788–789 (2009) (conversation of police officer on defendant's cellular telephone was admissible as evidence of nature of the cellular telephone as instrument used in cocaine distribution); Commonwealth v. Washington, 39 Mass. App. Ct. 195, 199–201, 654 N.E.2d 334, 336–337 (1995) (conversations of police officer with callers to defendant's beeper not hearsay when used to show that beeper was used for drug transactions). See so Commonwealth v. Purdy, 459 Mass. 442, 452, 945 N.E.2d 372, 382 (2011) (words soliciting sexual act have independent legal significance and are not hearsay); Commonwealth v. Mullane, 445 Mass. 702, 711, 840 N.E.2d 484, 494 (2006) (portion of conversation regarding negotiation for "extras" between police detective and "massage therapist" were not hearsay).

Prior Statements Used to Impeach or Rehabilitate. Ordinarily, the out-of-court statements of a testifying witness are hearsay if they are offered to prove the truth of the statement. Prior inconsistent statements are usually admissible only for the limited purpose of impeaching the credibility of the witness. But see Subsection 801(d)(1)(A) and the accompanying note. A witness's prior consistent statements are not admissible substantively under Massachusetts law, but they may be admissible for certain other purposes. See for example Section 413, First Complaint of Sexual Assault, and Section 613(b), Prior Statements of Witnesses, Limited Admissibility: Prior Consistent Statements. Cross-Reference: Section 105, Limited Admissibility.

Nonverbal Conduct Excluded as Hearsay. See Commonwealth v. Todd, 394 Mass. 791, 797, 477 N.E.2d 999, 1004 (1985) (explaining that the destruction of her marriage license could be considered "an extrajudicial, nonverbal assertion of the victim's intent which, if introduced for the truth of the matter asserted, would be, on its face, objectionable as hearsay"); Bartlett v. Emerson, 73 Mass. 174, 175–176 (1856) (testimony about another person's act of pointing out a boundary marker was an assertion of a fact and thus inadmissible as hearsay); Commonwealth v. Ramirez, 55 Mass. App. Ct. 224, 227, 770 N.E.2d 30, 33–34 (2002) (a business card offered to establish a connection between the defendant and a New York address on the card was hearsay because it was used as an assertion of a fact); Commonwealth v. Kirk, 39 Mass. App. Ct. 225, 229–230, 654 N.E.2d 938, 942 (1995) (conduct of a police officer who served a restraining order on the defendant offered to establish the identity of that person as the perpetrator was hearsay because its probative value depended on the truth of an assertion made in the papers by the victim that the defendant was the same person named in the complaint).

When an out-of-court statement is offered for a nonhearsay purpose, after considering the effectiveness of a Section 105 limiting instruction it is necessary to weigh the risk of unfair prejudice that would likely result if the jury misused the statement. See Section 403, Grounds for Excluding Relevant Evidence. In criminal cases, that risk can have confrontation clause implications.

Cross-Reference: Section 105, Limited Admissibility; Section 803(3)(B)(ii), Hearsay Exceptions; Availability of Declarant Immaterial: Then-Existing Mental, Emotional, or Physical Condition.

Subsection (d). This subsection addresses out-of-court statements that are admissible for their truth. Section 613, Prior Statements of Witnesses, Limited Admissibility, addresses prior statements for the limited purposes only of impeachment and rehabilitation.

Subsection (d)(1)(A). Massachusetts generally adheres to the orthodox rule that prior inconsistent statements are admissible only for the limited purpose of impeaching the credibility of a witness's testimony at trial and are inadmissible hearsay when offered to establish the truth of the matters asserted. See Section 613(a)(1), Prior Inconsistent Statements: Examining Own Witness, and Section 613(a)(2), Prior Statements of Witnesses, Limited Admissibility: Prior Inconsistent Statements: Examining Other Witness. However, in Commonwealth v. Daye, 393 Mass. 55, 66, 469 N.E.2d 483, 490–491 (1984), the Supreme Judicial Court adopted the principles of Proposed Mass. R. Evid. 801(d)(1)(A) allowing prior inconsistent statements made before a grand jury to be admitted substantively. The Daye rule has been extended to cover prior inconsistent statements made in other proceedings as well. See Commonwealth v. Sineiro, 432 Mass. 735, 740 N.E.2d 602 (2000) (probable cause hearings); Commonwealth v. Newman, 69 Mass. App. Ct. 495, 868 N.E.2d 946 (2007) (testimony given at an accomplice's trial). Commonwealth v. Ragland, 72 Mass. App. Ct. 815, 823 n.9, 894 N.E.2d 1147, 1154 n.9 (2008), made it clear in dicta that the same principles would apply to admission of prior inconsistent deposition evidence given under oath. See also Commonwealth v. Belmer, 78 Mass. App. Ct. 62, 64, 935 N.E.2d 327, 329 (2010) (prior inconsistent statement may be admissible for its full probative value where the witness has signed a written affidavit under penalties of perjury in support of an application for a restraining order pursuant to G. L. c. 209A and that witness is subject to cross-examination).

Two general requirements for the substantive use of such statements are (1) that there is an opportunity to cross-examine the declarant and (2) that the prior testimony was in the declarant's own words and was not coerced. In addition, if the prior inconsistent statement is relied on to establish an essential element of a crime, the Commonwealth must offer at least some additional evidence on that element in order to support a conclusion of guilt beyond a reasonable doubt. Commonwealth v. Daye, 393 Mass. at 73–75, 469 N.E.2d at 494–496. However, the additional evidence need not be sufficient in itself to establish the element. Commonwealth v. Noble, 417 Mass. 341, 345 & n.3, 629 N.E.2d 1328, 1330 & n.3 (1994). The corroboration requirement thus concerns the sufficiency of the evidence, not its admissibility. Commonwealth v. Clements, 436 Mass. 190, 193, 763 N.E.2d 55, 58 (2002); Commonwealth v. Ragland, 72 Mass. App. Ct. 815, 823, 894 N.E.2d 1147, 1154 (2008).

Feigning Lack of Memory. Upon a determination by the judge that a witness is feigning lack of memory, a prior statement may be admitted substantively as inconsistent with the claimed lack of memory, subject to the requirements of this subsection, Subsection 801(d)(1)(A). Commonwealth v. Sineiro, 432 Mass. 735, 745, 740 N.E.2d 602, 607–608 (2000). Before the prior statement may be admitted substantively, the judge must make a preliminary finding of fact under Section 104(a), Preliminary Questions: Determinations Made by the Court, that the witness is feigning an inability to remember. Commonwealth v. Evans, 439 Mass. 184, 190, 786 N.E.2d 375, 383 (2003). If supported by evidence, this finding is conclusive. Id. At a party's request, the judge may conduct a voir dire to make such a finding. Commonwealth v. Sineiro, 432 Mass. at 739, 740 N.E.2d at 606. A judge's finding of witness feigning is often based on a careful examination of the witness's demeanor and testimony in light of the judge's experience. See Id. at 740, 740 N.E.2d at 606; Commonwealth v. Newman, 69 Mass. App. Ct. 495, 497, 868 N.E.2d 946, 948 (2007). See, e.g., Commonwealth v. Figueroa, 451 Mass. 566, 573–574, 576–577, 887 N.E.2d 1040, 1046, 1048 (2008) (judge concluded that witness was feigning when he was able to recall many specific events of the evening in question but was unable to recall the portion of his grand jury testimony in which he said the defendant admitted to shooting someone, and a transcript failed to refresh his memory); Commonwealth v. Tiexeira, 29 Mass. App. Ct. 200, 204, 559 N.E.2d 408, 411 (1990) (judge observed how the witness's detailed account of the evening was conspicuously vague regarding the defendant's encounter with the victim). Regardless of the judge's conclusion at voir dire, the jury shall not be told of the judge's preliminary determination that the witness is feigning. Commonwealth v. Sineiro, 432 Mass. at 742 n.6, 740 N.E.2d at 608 n.6.

Cross-Reference: Section 613, Prior Statements of Witnesses, Limited Admissibility.

Subsection (d)(1)(B). In Commonwealth v. Cruz, 53 Mass. App. Ct. 393, 401 & n.10, 759 N.E.2d 723, 731–732 & n.10 (2001), the Appeals Court noted that the Supreme Judicial Court has not adopted Proposed Mass. R. Evid. 801(d)(1)(B) as to the admission of prior consistent statements as substantive evidence, rather than merely for the purpose of rehabilitating the credibility of a witness-declarant who has been impeached on the ground that his or her trial testimony is of recent contrivance. See also Commonwealth v. Thomas, 429 Mass. 146, 161–162, 706 N.E.2d 669, 680 (1999) (prior consistent statement admissible to rebut suggestion of recent contrivance); Commonwealth v. Kater, 409 Mass. 433, 448, 567 N.E.2d 885, 894 (1991) ("prior consistent statements of a witness may be admitted where the opponent has raised a claim or inference of recent contrivance, undue influence, or bias"); Commonwealth v. Zukoski, 370 Mass. 23, 26–27, 345 N.E.2d 690, 693 (1976) ("a witness's prior consistent statement is admissible where a claim is made that the witness's in-court statement is of recent contrivance or is the product of particular inducements or bias. . . . Unless admissible on some other ground to prove the truth of the facts asserted, such a prior consistent statement is admissible only to show that the witness's in-court testimony is not the product of the asserted inducement or bias or is not recently contrived as claimed").

Cross-Reference: Section 413, First Complaint of Sexual Assault.

Subsection (d)(1)(C). This subsection is derived from Commonwealth v. Cong Duc Le, 444 Mass. 431, 432, 436–437, 828 N.E.2d 501, 503, 506 (2005), where the Supreme Judicial Court "adopt[ed] the modern interpretation of the rule" expressed in Proposed Mass. R. Evid. 801(d)(1)(C), which, like its Federal counterpart, states that "[a] statement is not hearsay . . . if '[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person [made] after perceiving [the person].'" It is not necessary that the declarant make an in-court identification. See Commonwealth v. Machorro, 72 Mass. App. Ct. 377, 379–380, 892 N.E.2d 349, 351–352 (2008) (police officer allowed to testify to extrajudicial identification of the assailant by two victims who were present at trial and subject to cross-examination even though one victim could not identify the assailant [although she recalled being present at his arrest and was certain that the person arrested was the assailant] and the other victim was not asked to make an identification at trial). This subsection applies to an out-of-court identification based on a witness's familiarity with the person identified and is not limited to a photographic array, showup, or other identification procedure. Commonwealth v. Adams, 458 Mass. 766, 770–776, 941 N.E.2d 1127, 1130–1134 (2011). Multiple versions of an extrajudicial identification may be admissible for substantive purposes. Id. at 773, 941 N.E.2d at 1132.

Under this subsection, whether and to what extent third-party testimony about a witness's out-of-court identification may be admitted in evidence no longer turns on whether the identifying witness acknowledges or denies the extrajudicial identification at trial. See Commonwealth v. Cong Duc Le, 444 Mass. at 439–440, 828 N.E.2d at 507–509. The third-party testimony will be admitted for substantive purposes, as long as the cross-examination requirement is satisfied. Id. As the court explained, it is for the jury to "determine whose version to believe—the witness who claims not to remember or disavows the prior identification (including that witness's version of what transpired during the identification procedure), or the observer who testifies that the witness made a particular prior identification." Id. at 440, 828 N.E.2d at 508. The court concluded that

> "evidence of the prior identification will be considered along with all the other evidence that bears on the issue of the perpetrator's identity. The mere fact that the prior identification is disputed in some manner does not make it unhelpful to the jury in evaluating the over-all evidence as to whether the defendant on trial was the one who committed the charged offense."

Id.

Facts Accompanying an Identification. In Commonwealth v. Adams, 458 Mass. 766, 772, 941 N.E.2d 1127, 1132 (2011), the Supreme Judicial Court held as follows:

> "Absent context, an act or statement of identification is meaningless. . . . [I]dentification evidence must be accompanied either by some form of accusation relevant to the issue

> before the court, or some form of exclusionary statement, in order to be relevant to the case. The extent of the statement needed to provide context will vary from case to case . . . . We emphasize that the rule [is] not intended to render a witness's entire statement admissible but only so much as comprises relevant evidence on the issue of identification."

This issue should be the subject of a motion in limine. See also Commonwealth v. Walker, 460 Mass. 590, 608–609, 953 N.E.2d 195, 211 (2011). Cross-Reference: Section 1112, Eyewitness Identification.

Subsection (d)(2). This subsection defines admissions by a party-opponent as not hearsay, consistent with recent Supreme Judicial Court decisions, the Federal Rules of Evidence, and the Proposed Massachusetts Rules of Evidence. See Commonwealth v. Mendes, 441 Mass. 459, 467, 806 N.E.2d 393, 402 (2004); Commonwealth v. Allison, 434 Mass. 670, 676 n.5, 751 N.E.2d 868, 880 n.5 (2001); Commonwealth v. DiMonte, 427 Mass. 233, 243, 692 N.E.2d 45, 52 (1998), citing Proposed Mass. R. Evid. 801(d)(2); Fed. R. Evid. 801(d)(2); Proposed Mass. R. Evid. 801(d)(2). In some cases, the court has ruled that out-of-court statements by a party-opponent are admissible as an exception to the hearsay rule. See Commonwealth v. DeBrosky, 363 Mass. 718, 724, 297 N.E.2d 496, 501 (1973); Commonwealth v. McKay, 67 Mass. App. Ct. 396, 403 n.13, 853 N.E.2d 1098, 1103 n.13 (2006).

Subsection (d)(2)(A). This subsection is derived from Commonwealth v. Marshall, 434 Mass. 358, 365–366, 749 N.E.2d 147, 155 (2001), quoting P.J. Liacos, Massachusetts Evidence § 8.8.1 (7th ed. 1999). See also Commonwealth v. McCowen, 458 Mass. 461, 485–486, 939 N.E.2d 735, 757–758 (2010) (defendant's out-of-court statement offered for its truth is hearsay and not admissible when not offered by the Commonwealth); Care & Protection of Sophie, 449 Mass. 100, 110 n.14, 865 N.E.2d 789, 798 n.14 (2007) (no requirement that the statement of a party-opponent be contradictory or against the party-opponent's interest); Commonwealth v. Bonomi, 335 Mass. 327, 347, 140 N.E.2d 140, 156 (1957) ("An admission in a criminal case is a statement by the accused, direct or implied, of facts pertinent to the issue, which although insufficient in itself to warrant a conviction tends in connection with proof of other facts to establish his guilt"); Hopkins v. Medeiros, 48 Mass. App. Ct. 600, 613, 724 N.E.2d 336, 346 (2000) ("The evidence of [the defendant's] admission to sufficient facts was admissible as an admission of a party opponent."); Section 410, Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Compare Commonwealth v. Nawn, 394 Mass. 1, 4, 474 N.E.2d 545, 549 (1985) (The "longstanding rule [is] that if a defendant is charged with a crime and unequivocally denies it, that denial is not admissible in evidence."), with Commonwealth v. Lavalley, 410 Mass. 641, 649, 574 N.E.2d 1000, 1006 (1991) ("It is well-settled that false statements made by a defendant are admissible to show consciousness of guilt."). In Lavalley, the Supreme Judicial Court stated that the Commonwealth could show that a defendant's failure to include certain facts in his pretrial statement to the police that the defendant included in his testimony at trial was evidence of his consciousness of guilt and did not amount to an impermissible comment on his denial or failure to deny the offense. Id. at 649–650, 574 N.E.2d at 1005–1006. See also Commonwealth v. Lewis, 465 Mass. 119, 127, 987 N.E.2d 1218, 1225–1226 (2013) (when the defendant's statement is ambiguous but could be construed as consciousness of guilt ["I'll beat this"], it is admissible, and it is left to the parties to argue what meaning it should be given). However, if an extrajudicial statement of the defendant is an unequivocal denial of an accusation, that statement and the accusation it denies are inadmissible as hearsay. Commonwealth v. Spencer, 465 Mass. 32, 46, 987 N.E.2d 205, 217 (2013).

Under this subsection, deposition answers by an opposing party, Mass. R. Civ. P. 32(a)(2), interrogatory answers by an opposing party, G. L. c. 231, § 89, and responses to requests for admission of facts, Mass. R. Civ. P. 36(b), are not subject to a hearsay objection. See Federico v. Ford Motor Co., 67 Mass. App. Ct. 454, 460–461, 854 N.E.2d 448, 454–455 (2006); Beaupre v. Cliff Smith & Assocs., 50 Mass. App. Ct. 480, 484 n.8, 738 N.E.2d 753, 759 n.8 (2000).

Criminal Cases. The principle that the admission of a party-opponent, without more, is admissible is superceded by the requirements of the confrontation clause:

> "[W]here a nontestifying codefendant's statement expressly implicates the defendant, leaving no doubt that it would prove to be powerfully incriminating, the confrontation clause of the Sixth Amendment to the United States Constitution has been offended, notwithstanding any limiting instruction by the judge that the jury may consider the statement only against the codefendant."

Commonwealth v. Vallejo, 455 Mass. 72, 83, 914 N.E.2d 22, 31 (2009) (discussing Bruton v. United States, 391 U.S. 123 (1968)). See also Commonwealth v. Vasquez, 462 Mass. 827, 842–844, 971 N.E.2d 783, 797–798 (2012) (statement made by nontestifying defendant to police admissible where statement did not expressly or "obviously" refer directly to defendant).

Subsection (d)(2)(B). This subsection is taken verbatim from Fed. R. Evid. 801(d)(2)(B) and is consistent with Massachusetts law. See also Proposed Mass. R. Evid. 801(d)(2)(B). "Where a party is confronted with an accusatory statement which, under the circumstances, a reasonable person would challenge, and the party remains silent or responds equivocally, the accusation and the reply may be admissible on the theory that the party's response amounts to an admission of the truth of the accusation." Commonwealth v. MacKenzie, 413 Mass. 498, 506, 597 N.E.2d 1037, 1043 (1992). Accord Commonwealth v. Braley, 449 Mass. 316, 320–321, 867 N.E.2d 743, 749–750 (2007); Zucco v. Kane, 439 Mass. 503, 507–508, 789 N.E.2d 115, 118–119 (2003); Commonwealth v. Silanskas, 433 Mass. 678, 694, 746 N.E.2d 445, 461 (2001). This is commonly referred to as an "adoptive admission."

Admission by Silence. For an admission by silence to be admissible it must be apparent that the party has heard and understood the statement, had an opportunity to respond, and the context was one in which the party would have been expected to respond. Commonwealth v. Olszewski, 416 Mass. 707, 719, 625 N.E.2d 529, 537 (1993), cert. denied, 513 U.S. 835 (1994). See Leone v. Doran, 363 Mass. 1, 16, 292 N.E.2d 19, 31, modified on other grounds, 363 Mass. 886, 297 N.E.2d 493 (1973). "Because silence may mean something other than agreement or acknowledgment of guilt (it may mean inattention or perplexity, for instance), evidence of adoptive admissions by silence must be received and applied with tion." Commonwealth v. Babbitt, 430 Mass. 700, 705, 723 N.E.2d 17, 22 (2000). See generally Commonwealth v. Nickerson, 386 Mass. 54, 61 n.6, 434 N.E.2d 992, 996 n.6 (1982) (cautioning against the use of a defendant's prearrest silence to show consciousness of guilt and indicating such evidence is admissible only in "unusual circumstances"). Accordingly, adoption by silence can be imputed to a defendant only for statements that "clearly would have produced a reply or denial on the part of an innocent son." Commonwealth v. Brown, 394 Mass. 510, 515, 476 N.E.2d 580, 583 (1985).

> "No admission by silence may be inferred, however, if the statement is made after the accused has been placed under arrest[, see Commonwealth v. Kenney, 53 Mass. 235, 238 (1847); Commonwealth v. Morrison, 1 Mass. App. Ct. 632, 634, 305 N.E.2d 518, 520 (1973); Commonwealth v. Cohen, 6 Mass. App. Ct. 653, 657, 382 N.E.2d 1105, 1108–1109 (1978)], after the police have read him his Miranda rights[, see Commonwealth v. Rembiszewski, 363 Mass. 311, 316, 293 N.E.2d 919, 923 (1973)], or after he has been so significantly deprived of his freedom that he is, in effect, in police custody[, see Commonwealth v. Corridori, 11 Mass. App. Ct. 469, 480, 417 N.E.2d 969, 977 (1981)]."

Commonwealth v. Stevenson, 46 Mass. App. Ct. 506, 510, 707 N.E.2d 385, 388 (1999), ing Commonwealth v. Ferrara, 31 Mass. App. Ct. 648, 652, 852 N.E.2d 961, 964 (1991).

Admission by Conduct. "An admission may be implied from conduct as well as from words." Commonwealth v. Bonomi, 335 Mass. 327, 348, 140 N.E.2d 140, 156 (1957). For instance,

> "[a]ctions and statements that indicate consciousness of guilt on the part of the defendant are admissible and together with other evidence, may be sufficient to prove guilt. . . . [T]his theory usually has been applied to cases where a defendant runs away . . . or makes intentionally false and misleading statements to police . . . or makes threats against key witnesses for the prosecution . . . ."

Commonwealth v. Montecalvo, 367 Mass. 46, 52, 323 N.E.2d 888, 892 (1975). See also Olofson v. Kilgallon, 362 Mass. 803, 806, 291 N.E.2d 600, 602–603 (1973), citing Hall v. Shain, 291 Mass. 506, 512–513, 197 N.E. 437, 440 (1935). For a thorough discussion of the evidentiary and constitutional issues surrounding the use of a defendant's prearrest silence or conduct to establish consciousness of guilt, see Commonwealth v. Irwin, 72 Mass. App. Ct. 643, 648–656, 893 N.E.2d 414, 419–424 (2008). "[A] judge should instruct the jury [1] that they are not to convict a defendant on the basis of evidence of [conduct] alone, and [2] that they may, but need not, consider such evidence as one of the factors tending to prove the guilt of the defendant" (citation omitted). Commonwealth v. Toney, 385 Mass. 575, 585, 433 N.E.2d 425, 432 (1982).

Subsection (d)(2)(C). This subsection is derived from Sacks v. Martin Equip. Co., 333 Mass. 274, 279–280, 130 N.E.2d 547, 550 (1955).

This subsection covers the admissibility of statements by an agent who has been authorized by the principal to speak on his behalf. See Simonoko v. Stop & Shop, Inc., 376 Mass. 929, 929, 383 N.E.2d 505, 506 (1978) (concluding there was no showing of the manager's authority to speak for the defendant). Contrast Section 801(d)(2)(D), Definitions: Statements Which Are Not Hearsay: Admission by Party-Opponent, which deals with statements of agents.

Subsection (d)(2)(D). This subsection is derived from Ruszcyk v. Secretary of Pub. Safety, 401 Mass. 418, 420–423, 517 N.E.2d 152, 154–156 (1988), in which the Supreme Judicial Court adopted Proposed Mass. R. Evid. 801(d)(2)(D).

To determine whether a statement qualifies as a vicarious admission, the judge first must decide as a preliminary question of fact whether the declarant was authorized to act on the matters about which he or she spoke. See Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779, 791, 667 N.E.2d 907, 916 (1996). If the judge finds that the declarant was so authorized, the judge must then decide whether the probative value of the statement was substantially outweighed by its potential for unfair prejudice. Id. In so doing,

> "the judge should consider the credibility of the witness; the proponent's need for the evidence, e.g., whether the declarant is available to testify; and the reliability of the evidence offered, including consideration of whether the statement was made on firsthand knowledge and of any other circumstances bearing on the credibility of the declarant. Ruszcyk v. Secretary of Pub. Safety, [401 Mass.] at 422–423, 517 N.E.2d 152, [155]" (footnote and quotation omitted).

Thorell v. ADAP, Inc., 58 Mass. App. Ct. 334, 339–340, 789 N.E.2d 1086, 1091 (2003). The out-of-court statements of the agent are hearsay and thus inadmissible for the purpose of proving the existence of the agency; however, the agency may be shown through the agent's testimony at trial. Campbell v. Olender, 27 Mass. App. Ct. 1197, 1198, 543 N.E.2d 708, 709 (1989).

Subsection (d)(2)(E). This subsection is derived from Commonwealth v. Bongarzone, 390 Mass. 326, 340, 455 N.E.2d 1183, 1192 (1983), which relied on Proposed Mass. R. Evid. 801(d)(2)(E) and the identical Fed. R. Evid. 801(d)(2)(E). See also Commonwealth v. Braley, 449 Mass. 316, 319–321, 867 N.E.2d 743, 749–750 (2007).

> "This exception to the rule against hearsay is premised on a belief that '[t]he community of activities and interests which exists among the coventurers during the enterprise tends in some degree to assure that their statements about one another will be minimally ble.' Commonwealth v. White, 370 Mass. [703], 712, 352 N.E.2d 904 [(1976)]."

Commonwealth v. Bongarzone, 390 Mass. at 340, 455 N.E.2d at 1192.

The judge must be satisfied by a preponderance of admissible evidence other than the extrajudicial statement that a criminal joint venture existed between the declarant and the defendant. Commonwealth v. Silanskas, 433 Mass. 678, 692–693, 746 N.E.2d 445, 460 (2001), citing Commonwealth v. Cruz, 430 Mass.

838, 844, 724 N.E.2d 683, 689–690 (2000). See also Commonwealth v. McLaughlin, 431 Mass. 241, 246, 726 N.E.2d 959, 963–964 (2000). The judge is not required to make a preliminary finding that a joint criminal enterprise existed and may admit the evidence "subject to a later motion to strike if the prosecution fails to show that the defendant was part of a joint enterprise." Commonwealth v. Colon-Cruz, 408 Mass. 533, 543–544, 562 N.E.2d 797, 806 (1990). The judge must also instruct the jury that they can only consider evidence of the hearsay statements if they find, on the basis of all the other evidence, not including the hearsay statements, that a joint venture existed. Commonwealth v. Boyer, 52 Mass. App. Ct. 590, 598, 755 N.E.2d 767, 773 (2001).

This exception extends to situations where "the joint venturers are acting to conceal the crime that formed the basis of the criminal enterprise[,]" Commonwealth v. Ali, 43 Mass. App. Ct. 549, 561, 684 N.E.2d 1200, 1208 (1997), quoting Commonwealth v. Angiulo, 415 Mass. 502, 519, 615 N.E.2d 155, 166 (1993), but it "does not apply after the criminal enterprise has ended, as where a joint venturer has been apprehended and imprisoned." Commonwealth v. Colon-Cruz, 408 Mass. at 543, 562 N.E.2d at 806. Thus, a confession or admission of a coconspirator or joint venturer made after the termination of the conspiracy or joint venture is not admissible as a vicarious statement of another member of the conspiracy or joint venture. Commonwealth v. Bongarzone, 390 Mass. at 340 n.11, 455 N.E.2d at 1192 n.11, citing Commonwealth v. White, 370 Mass. at 708–712, 352 N.E.2d at 908–910. Cf. Commonwealth v. Leach, 73 Mass. App. Ct. 758, 766, 901 N.E.2d 708, 715–716 (2009) (although statements made by codefendants occurred after they were in custody, statements were made shortly after the crime and for the purpose of concealing the crime and thus became admissible against each defendant).

Section 802. Hearsay Rule

Hearsay is generally inadmissible unless it falls within an exception to the hearsay rule as provided by case law, statute, or rule prescribed by the Supreme Judicial Court.

NOTE

This section is derived from Commonwealth v. Rice, 441 Mass. 291, 305, 805 N.E.2d 26, 39 (2004) (hearsay "is generally inadmissible unless it falls within an exception to the hearsay rule"). See Commonwealth v. Markvart, 437 Mass. 331, 335, 771 N.E.2d 778, 782 (2002) ("hearsay not otherwise admissible under the rules of evidence is inadmissible at the trial . . . unless specifically made admissible by statute"). There is no "innominate" or catchall exception to the hearsay rule in Massachusetts whereby hearsay may be admitted on an ad hoc basis provided that there are circumstantial guarantees of trustworthiness. See Commonwealth v. Pope, 397 Mass. 275, 281–282, 491 N.E.2d 240, 244 (1986); Commonwealth v. Meech, 380 Mass. 490, 497, 403 N.E.2d 1174, 1179 (1980); Commonwealth v. White, 370 Mass. 703, 713, 352 N.E.2d 904, 911 (1976). Contrast Fed. R. Evid. 807.

In addition to exceptions established by case law, several Massachusetts statutes and rules provide exceptions to the rule against hearsay, including, but not limited to the following:

G. L. c. 79, § 35 (assessed valuation of real estate);

G. L. c. 111, § 195 (certain lead inspection reports);

G. L. c. 119, § 24 (court investigation reports);

G. L. c. 119, §§ 51A, 51B (Department of Children and Families reports);

G. L. c. 123A, §§ 6A, 9 (sexually dangerous person statute);

G. L. c. 152, §§ 20A, 20B (medical reports);

G. L. c. 175, § 4(7) (report of Commissioner of Insurance);

G. L. c. 185C, § 21 (housing inspection report);

G. L. c. 233, § 65 (declaration of deceased person);

G. L. c. 233, § 65A (answers to interrogatories of deceased party);

G. L. c. 233, § 66 (declarations of testator);

G. L. c. 233, § 69 (records of other courts);

G. L. c. 233, § 70 (judicial notice of law);

G. L. c. 233, § 79B (publicly issued compilations of fact);

G. L. c. 233, § 79C (treatises in malpractice actions);

G. L. c. 233, § 79F (certificate of public way);

G. L. c. 233, § 79G (medical and hospital bills);

G. L. c. 233, § 79H (medical reports of deceased physicians);

G. L. c. 239, § 8A, ¶ 3 (board of health inspection report if certified by inspector who conducted the inspection);

Mass. R. Civ. P. 32(a)(3) (depositions); and

Mass. R. Crim. P. 35(g) (depositions).

If no objection to the hearsay statement is made and it has been admitted, it "may be weighed with the other evidence, and given any evidentiary value which it may possess." Mahoney v. Harley Private Hosp., Inc., 279 Mass. 96, 100, 180 N.E. 723, 725 (1932). In a criminal case, the admission of such a statement will be reviewed to determine whether its admission created a substantial risk of a miscarriage of justice. See Commonwealth v. Keevan, 400 Mass. 557, 562, 511 N.E.2d 534, 538 (1987).

Section 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement, or

(2) refuses to testify [exception not recognized], or

(3) testifies to a lack of memory [exception not recognized], or

(4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity, or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if the unavailability is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Prior Recorded Testimony. Testimony given as a witness at another trial or hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and a similar motive to develop the testimony by direct, cross-, or redirect examination.

(2) Statement Made Under Belief of Impending Death. In a prosecution for homicide, a statement made by a declarant-victim under the belief of imminent death and who died shortly after making the statement, concerning the cause or circumstances of what the declarant believed to be the declarant's own impending death or that of a co-victim.

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, the exception does not apply to a statement that is offered to exculpate the defendant or that is offered by the Commonwealth to inculpate the defendant, and that tends to expose the declarant to criminal liability, unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of Personal History.

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, or ancestry, even if the declarant had no means of acquiring personal knowledge of the matter stated.

(B) A statement regarding foregoing matters concerning another person to whom the declarant is related [exception not recognized].

(5) Statutory Exceptions in Civil Cases.

(A) Declarations of Decedent. In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant.

(B) Deceased Party's Answers to Interrogatories. If a party to an action who has filed answers to interrogatories under any applicable statute or any rule of the Massachusetts Rules of Civil Procedure dies, so much of such answers as the court finds have been made upon the personal knowledge of the deceased shall not be inadmissible as hearsay or self-serving if offered in evidence in said action by a representative of the deceased party.

(C) Declarations of Decedent in Actions Against an Estate. If a cause of action brought against an executor or administrator is supported by oral testimony of a promise or statement made by the testator or intestate of the defendant, evidence of statements, written or oral, made by the decedent, memoranda and entries written by the decedent, and evidence of the decedent's acts and habits of dealing, tending to disprove or to show the improbability of the making of such promise or statement, shall be admissible.

(D) Reports of Deceased Physicians in Tort Actions. In an action of tort for personal injuries or death, or for consequential damages arising from such personal injuries, the medical report of a deceased physician who attended or examined the plaintiff, including expressions of medical opinion, shall, at the discretion of the trial judge, be admissible in evidence, but nothing therein contained which has reference to the question of liability shall be so admissible. Any opposing party shall have the right to introduce evidence tending to limit, modify, contradict, or rebut such medical report. The word "physician" as used in this section shall not include any person who was not licensed to practice medicine under the laws of the jurisdiction within which such medical attention was given or such examination was made.

(E) Medical Reports of Disabled or Deceased Physicians as Evidence in Workers' Compensation Proceedings. In proceedings before the industrial accident board, the medical report of an incapacitated, disabled, or deceased physician who attended or examined the employee, including expressions of medical opinion, shall, at the discretion of the member, be admissible as evidence if the member finds that such medical report was made as the result of such physician's attendance or examination of the employee.

(6) Forfeiture by Wrongdoing. A statement offered against a party who forfeits, by virtue of wrongdoing, the right to object to its admission based on findings by the court that (A) the

witness is unavailable; (B) the party was involved in, or responsible for, procuring the unavailability of the witness; and (C) the party acted with the intent to procure the witness's unavailability.

(7) Religious Records. Statements of fact made by a deceased person authorized by the rules or practices of a religious organization to perform a religious act, contained in a certificate that the maker performed such act, and purporting to be issued at the time of the act or within a reasonable time thereafter.

(8) Admissibility in Criminal Proceedings of a Child's Out-of-Court Statement Describing Sexual Contact. General Laws c. 233, § 81, was adopted prior to the United States Supreme Court's decisions in Crawford v. Washington, 541 U.S. 36 (2004), and Davis v. Washington, 547 U.S. 813 (2006), as well as the Supreme Judicial Court's decisions in Commonwealth v. Gonsalves, 445 Mass. 1, 833 N.E.2d 549 (2005), cert. denied, 548 U.S. 926 (2006), and Commonwealth v. Amirault, 424 Mass. 618, 677 N.E.2d 652 (1997). These decisions call into question the constitutionality of this subsection.

(A) Admissibility in General. An out-of-court statement of a child under the age of ten describing an act of sexual contact performed on or with the child, the circumstances under which it occurred, or which identifies the perpetrator shall be admissible as substantive evidence in any criminal proceeding; provided, however, that

(i) the statement is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts,

(ii) the person to whom the statement was made or who heard the child make the statement testifies,

(iii) the judge finds pursuant to Section 804(b)(8)(B) that the child is unavailable as a witness,

(iv) the judge finds pursuant to Section 804(b)(8)(C) that the statement is reliable, and

(v) the statement is corroborated pursuant to Section 804(b)(8)(D).

(B) Unavailability of Child. The proponent of such statement shall demonstrate a diligent and good-faith effort to produce the child and shall bear the burden of showing unavailability. A finding of unavailability shall be supported by specific findings on the record, describing facts with particularity, demonstrating that

(i) the child is unable to be present or to testify because of death or physical or mental illness or infirmity;

(ii) by a ruling of the court, the child is exempt on the ground of privilege from testifying concerning the subject matter of such statement;

(iii) the child testifies to a lack of memory of the subject matter of such statement;

(iv) the child is absent from the hearing and the proponent of such statement has been unable to procure the attendance of the child by process or by other reasonable means;

(v) the court finds, based upon expert testimony from a treating psychiatrist, psychologist, or clinician, that testifying would be likely to cause severe psychological or emotional trauma to the child; or

(vi) the child is not competent to testify.

(C) Reliability of Statement. If a finding of unavailability is made, the out-of-court statement shall be admitted if the judge further finds,

(i) after holding a separate hearing, that such statement was made under oath, that it was accurately recorded and preserved, and that there was sufficient opportunity to cross-examine, or

(ii) after holding a separate hearing and, where practicable and where not inconsistent with the best interests of the child, meeting with the child, that such statement was made under circumstances inherently demonstrating a special guarantee of reliability.

For the purposes of finding circumstances demonstrating reliability pursuant to this subsection, a judge may consider whether the relator documented the child witness's statement and shall consider the following factors:

(a) the clarity of the statement, meaning the child's capacity to observe, remember, and give expression to that which such child has seen, heard, or experienced; provided, however, that a finding under this clause shall be supported by expert testimony from a treating psychiatrist, psychologist, or clinician;

(b) the time, content, and circumstances of the statement; and

(c) the child's sincerity and ability to appreciate the consequences of such statement.

(D) Corroborating Evidence. The out-of-court statement must be corroborated by other independently admitted evidence.

(E) Admissibility by Common Law or Statute. An out-of-court statement admissible by common law or by statute shall remain admissible notwithstanding the provisions of this section.

(9) Out-of-Court Statement of Child Describing Sexual Contact in Civil Proceeding, Including Termination of Parental Rights.

(A) Admissibility in General. The out-of-court statements of a child under the age of ten describing any act of sexual contact performed on or with the child, the circumstances

under which it occurred, or which identifies the perpetrator shall be admissible as substantive evidence in any civil proceeding, except proceedings brought under G. L. c. 119, §§ 23(C) and 24; provided, however, that

(i) such statement is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts,

(ii) the person to whom such statement was made or who heard the child make such statement testifies,

(iii) the judge finds pursuant to Section 804(b)(9)(B) that the child is unavailable as a witness,

(iv) the judge finds pursuant to Section 804(b)(9)(C) that such statement is reliable, and

(v) such statement is corroborated pursuant to Section 804(b)(9)(D).

(B) Unavailability of Child. The proponent of such statement shall demonstrate a diligent and good-faith effort to produce the child and shall bear the burden of showing unavailability. A finding of unavailability shall be supported by specific findings on the record, describing facts with particularity, demonstrating that

(i) the child is unable to be present or to testify because of death or existing physical or mental illness or infirmity;

(ii) by a ruling of the court, the child is exempt on the ground of privilege from testifying concerning the subject matter of such statement;

(iii) the child testifies to a lack of memory of the subject matter of such statement;

(iv) the child is absent from the hearing and the proponent of such statement has been unable to procure the attendance of the child by process or by other reasonable means;

(v) the court finds, based upon expert testimony from a treating psychiatrist, psychologist, or clinician, that testifying would be likely to cause severe psychological or emotional trauma to the child; or

(vi) the child is not competent to testify.

(C) Reliability of Statement. If a finding of unavailability is made, the out-of-court statement shall be admitted if the judge further finds,

(i) after holding a separate hearing, that such statement was made under oath, that it was accurately recorded and preserved, and that there was sufficient opportunity to cross-examine, or

(ii) after holding a separate hearing and, where practicable and where not inconsistent with the best interests of the child, meeting with the child, that such statement was made under circumstances inherently demonstrating a special guarantee of reliability.

For the purposes of finding circumstances demonstrating reliability pursuant to this subsection, a judge may consider whether the relator documented the child witness's statement and shall consider the following factors:

(a) the clarity of the statement, meaning the child's capacity to observe, remember, and give expression to that which such child has seen, heard, or experienced; provided, however, that a finding under this clause shall be supported by expert testimony from a treating psychiatrist, psychologist, or clinician;

(b) the time, content, and circumstances of the statement;

(c) the existence of corroborative evidence of the substance of the statement regarding the abuse, including either the act, the circumstances, or the identity of the perpetrator; and

(d) the child's sincerity and ability to appreciate the consequences of the statement.

(D) Corroborating Evidence. The out-of-court statement must be corroborated by other independently admitted evidence.

(E) Admissibility by Common Law or Statute. An out-of-court statement admissible by common law or by statute shall remain admissible notwithstanding the provisions of this section.

NOTE

Confrontation Clause. In a criminal case, a hearsay statement offered against the accused must satisfy both the confrontation clause and one of the hearsay exceptions. For a discussion of the relationship between the confrontation clause and the hearsay exceptions stated in Section 804, refer to the Introductory Note to Article VIII.

Introduction. Section 804 defines hearsay exceptions that are conditioned upon a showing that the declarant is unavailable. Section 804(a) defines the requirement of unavailability that applies to all the hearsay exceptions in Section 804(b). The second paragraph of Section 804(a) is consistent with the doctrine of forfeiture by wrongdoing adopted by the Supreme Judicial Court in Commonwealth v. Edwards, 444 Mass. 526, 540, 830 N.E.2d 158, 170 (2005).

The exceptions that apply when the declarant of the out-of-court statement is unavailable address only the evidentiary rule against hearsay, except in the context of forfeiture by wrongdoing. See Section 804(b)(6), Hearsay Exceptions; Declarant Unavailable: Hearsay Exceptions: Forfeiture by Wrongdoing. In criminal cases, the admissibility at trial of an out-of-court statement against the defendant also requires consideration of the constitutional right to confrontation under the Sixth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. For a discussion of the relationship between the

confrontation clause and the hearsay exceptions stated in Section 804, refer to the Introductory Note to Article VIII.

A defendant invoking the Fifth Amendment privilege against self-incrimination only makes himself or herself unavailable to another party, but the defendant is not unavailable as to himself or herself. See Commonwealth v. Labelle, 67 Mass. App. Ct. 698, 701, 856 N.E.2d 876, 879 (2006). It should not be presumed that an absent witness may invoke his or her privilege against self-incrimination. See Commonwealth v. Lopera, 42 Mass. App. Ct. 133, 137 n.3, 674 N.E.2d 1340, 1343 n.3 (1997). But where the declarant is a codefendant and joint venturer in the crimes charged against the defendant, and the declarant's out-of-court statements directly implicate the declarant in the criminal enterprise, the unavailability requirement is satisfied because the defendant undoubtedly would invoke the Fifth Amendment privilege. See Commonwealth v. Charles, 428 Mass. 672, 677–679, 704 N.E.2d 1137, 1143–1144 (1999).

Subsection (a)(1). This subsection is derived from Commonwealth v. Canon, 373 Mass. 494, 499–500, 368 N.E.2d 1181, 1184–1185 (1977), cert. denied, 435 U.S. 933 (1978) (valid invocation of privilege against self-incrimination rendered witness unavailable). Unavailability is not defined simply in terms of lack of physical presence, but stems from the inability of opposing counsel to cross-examine the ness. Commonwealth v. DiPietro, 373 Mass. 369, 382, 367 N.E.2d 811, 819 (1977). Accord Commonwealth v. Negron, 441 Mass. 685, 688–691, 808 N.E.2d 294, 298–299 (2004) (valid claim of spousal privilege by defendant's wife rendered her unavailable). However, a claim of privilege will not be presumed simply because a witness might have a basis for asserting it if the witness had appeared and been called to testify. See Commonwealth v. Charros, 443 Mass. 752, 767–768, 824 N.E.2d 809, 820–821 (2005).

Subsection (a)(2). The Supreme Judicial Court has not yet adopted Proposed Mass. R. Evid. 804(a)(2), which, like the Federal rule, provides that a witness who persists in refusing to testify concerning the subject matter of his or her statement may be deemed to be unavailable. See Commonwealth v. Fisher, 433 Mass. 340, 355–356, 742 N.E.2d 61, 74 (2001) (explaining that absent the assertion of a privilege against self-incrimination, a witness's refusal to testify does not render the witness unavailable for purposes of the hearsay exception for prior recorded testimony).

Subsection (a)(3). Massachusetts law does not recognize lack of memory of the subject matter of the testimony as a basis for finding that the witness is unavailable. Commonwealth v. Bray, 19 Mass. App. Ct. 751, 758, 477 N.E.2d 596, 601 (1985). Cf. A.T. Stearns Lumber Co. v. Howlett, 239 Mass. 59, 61, 131 N.E. 217, 218 (1921) (declining to extend doctrine of past recollection recorded to permit introduction of prior recorded testimony that witness had no present memory of but recalled was the truth).

Subsection (a)(4). This subsection is derived from Commonwealth v. Bohannon, 385 Mass. 733, 742, 434 N.E.2d 163, 169 (1982) ("death or other legally sufficient reason"), and cases cited. See Commonwealth v. Mustone, 353 Mass. 490, 491–492, 233 N.E.2d 1, 3 (1968) (death of witness). In Ibanez v. Winston, 222 Mass. 129, 130, 109 N.E. 814, 814 (1915), the Supreme Judicial Court observed that although the death or insanity of a witness would supply the basis for a finding of unavailability, the mere fact that a witness had returned to Spain, without more, did not demonstrate that he was unavailable. However, in Commonwealth v. Hunt, 38 Mass. App. Ct. 291, 295, 647 N.E.2d 433, 436 (1995), the Appeals Court noted that

> "[w]hen a witness is outside of the borders of the United States and declines to honor a request to appear as a witness, the unavailability of that witness has been conceded because a State of the United States has no authority to compel a resident of a foreign country to attend a trial here."

Subsection (a)(5). This subsection is derived from Commonwealth v. Charles, 428 Mass. 672, 678, 704 N.E.2d 1137, 1143 (1999) ("We accept as a basis of unavailability the principles expressed in Rule 804[a][5] of the Federal Rules of Evidence [1985]"). In Commonwealth v. Sena, 441 Mass. 822, 832, 809 N.E.2d 505, 514 (2004), the Supreme Judicial Court noted that

> "[b]efore allowing the Commonwealth to introduce prior recorded testimony, the judge must be satisfied that the Commonwealth has made a good faith effort to locate and produce the witness at trial. Whether the Commonwealth carries its burden on the question of sufficient diligence in attempting to obtain the attendance of the desired witness depends upon what is a reasonable effort in light of the peculiar facts of the case." (Citations and quotation omitted.)

See Commonwealth v. Roberio, 440 Mass. 245, 248, 797 N.E.2d 364, 367 (2003) (where prosecutor established unavailability before trial of witness who is then located out of State during trial, court is not required to suspend trial to obtain presence of witness); Commonwealth v. Charles, 428 Mass. at 678, 704 N.E.2d at 1143 (evidence that declarant is a fugitive satisfies unavailability requirement); Commonwealth v. Pittman, 60 Mass. App. Ct. 161, 169–170, 800 N.E.2d 322, 329 (2003) (witness who ignored defense counsel's subpoena and instead attended an out-of-State funeral was unavailable). Contrast Ruml v. Ruml, 50 Mass. App. Ct. 500, 508–509, 738 N.E.2d 1131, 1139–1140 (2000) (self-imposed exile from Massachusetts does not satisfy unavailability requirement); Commonwealth v. Hunt, 38 Mass. App. Ct. 291, 295–296, 647 N.E.2d 433, 436 (1995) (fact that prospective witness is a foreign national outside United States does not excuse proponent of statement from making diligent effort to locate and secure attendance of witness). "When former testimony is sought to be offered against the accused, the degree of 'good faith' and due diligence is greater than that required in other situations." Commonwealth v. Bohannon, 385 Mass. 733, 745, 434 N.E.2d 163, 170 (1982).

Subsection (b)(1). This subsection is derived from Commonwealth v. Meech, 380 Mass. 490, 494, 403 N.E.2d 1174, 1177–1178 (1980), and Commonwealth v. DiPietro, 373 Mass. 369, 380–385, 367 N.E.2d 811, 818–820 (1977). See Mass. R. Civ. P. 32 and Mass. R. Crim. P. 35 (use of depositions in proceedings).

> "The prior recorded testimony exception to the hearsay rule applies 'where the prior testimony was given by a person, now unavailable, in a proceeding addressed to substantially the same issues as in the current proceeding, with reasonable opportunity and similar motivation on the prior occasion for cross-examination of the declarant by the party against whom the testimony is now being offered.'"

Commonwealth v. Fisher, 433 Mass. 340, 355, 742 N.E.2d 61, 73 (2001), quoting Commonwealth v. Trigones, 397 Mass. 633, 638, 492 N.E.2d 1146, 1149–1150 (1986). The party against whom the testimony is being offered need not actually cross-examine the declarant; only an adequate opportunity to cross-examine the declarant is required. Commonwealth v. Canon, 373 Mass. 494, 499–501, 368 N.E.2d 1181, 1184–1185 (1977), cert. denied, 435 U.S. 933 (1978). See Commonwealth v. Hurley, 455 Mass. 53, 62–63, 913 N.E.2d 850, 859 (2009) ("A defendant is not entitled under the confrontation clause to a cross-examination that is 'effective in whatever way, and to whatever extent the defense might wish.' Rather, what is essential is that the 'trier of fact [have] a satisfactory basis for evaluating the truth of the prior statement.'" [Citations omitted.]).

The Supreme Judicial Court has applied this hearsay exception when the prior recorded testimony was given at a probable cause hearing, see Commonwealth v. Mustone, 353 Mass. 490, 492–494, 233 N.E.2d 1, 3–4 (1968), and at a pretrial dangerousness hearing under G. L. c. 276, § 58A. See Commonwealth v. Hurley, 455 Mass. at 63 & n.9, 913 N.E.2d at 860 & n.9 (noting that there is "no general rule that a witness's prior testimony at a pretrial detention hearing is always admissible at trial if that witness becomes unavailable."). See also id. at 66–67, 913 N.E.2d at 861–862 (when an excited utterance is admitted at a pretrial hearing as an exception to the hearsay rule in circumstances in which the defendant is not given an opportunity to cross-examine the declarant about the facts described in the excited utterance, the admission of the evidence violates the confrontation clause). Cf. Commonwealth v. Arrington, 455 Mass. 437, 442–445, 917 N.E.2d 734, 738–740 (2009) (upholding order that excluded from trial the alleged victim's testimony at a pretrial dangerousness hearing under G. L. c. 276, § 58, on grounds that due to her medical condition [late stage cancer], defense counsel was deprived of reasonable opportunity for cross-examination).

In Commonwealth v. Clemente, 452 Mass. 295, 313–315, 893 N.E.2d 19, 37–38 (2008), the Supreme Judicial Court held that this hearsay exception is not generally applicable to prior recorded testimony before the grand jury because the testimony of such witnesses is usually far more limited than at trial and is often presented without an effort to corroborate or discredit it. "If, however, the party seeking the admission of the grand jury testimony can establish that the Commonwealth had an opportunity and similar motive to develop fully a (now unavailable) witness's testimony at the grand jury, that earlier testimony would be admissible." Id. at 315, 893 N.E.2d at 38.

The declarant's prior testimony must be able to be "substantially reproduced in all material particulars." Commonwealth v. Martinez, 384 Mass. 377, 381, 425 N.E.2d 300, 303 (1981). See G. L. c. 233, § 80 (official transcripts); Commonwealth v. DiPietro, 373 Mass. at 392–394, 367 N.E.2d at 824–825 (unofficial transcripts); Commonwealth v. Vaden, 373 Mass. 397, 400, 367 N.E.2d 621, 623 (1977) (tape recordings, whether official or unofficial); Commonwealth v. Janovich, 55 Mass. App. Ct. 42, 45, 769 N.E.2d 286, 290 (2002) (witness present at prior proceeding).

Subsection (b)(2). This subsection is derived from Commonwealth v. Polian, 288 Mass. 494, 497, 193 N.E. 68, 69 (1934), and Commonwealth v. Vona, 250 Mass. 509, 511, 146 N.E. 20, 20 (1925). This common-law exception is not subject to the defendant's right to confrontation. See Commonwealth v. Nesbitt, 452 Mass. 236, 251, 892 N.E.2d 299, 311 (2008) ("Thus, in the unique instance of dying declarations, we ask *only* whether the statement is admissible as a common-law dying declaration, and not whether the statement is testimonial."). The "dying declaration" allows testimony as to the victim's statements concerning the circumstances of the killing and the identity of the perpetrator. Commonwealth v. Polian, 288 Mass. at 500, 193 N.E.2d at 70. It may be in the form of oral testimony, gestures, or a writing made by the victim. See Commonwealth v. Casey, 65 Mass. 417, 422 (1853) (victim who was mortally wounded and unable to speak, but conscious, confirmed identity of perpetrator by squeezing the hand of her treating physician who asked her if it was "Mr. Casey, who worked for her husband"). The Supreme Judicial Court has left open the question whether a defendant's right to confrontation is applicable to the current, expanded concept of the dying declaration exception. See Commonwealth v. Nesbitt, 452 Mass. at 252 n.17, 892 N.E.2d at 312 n.17, citing G. L. c. 233, § 64 (addressing admissibility of dying declarations of a female whose death results from an unlawful abortion in violation of G. L. c. 272, § 19), and Commonwealth v. Key, 381 Mass. 19, 26, 407 N.E.2d 327, 332–333 (1980) (expanding the common-law exception by admitting a dying declaration to prove the homicides of other common victims).

The declarant's belief of impending death may be inferred from the surrounding circumstances, including the character of the injury sustained. See Commonwealth v. Moses, 436 Mass. 598, 602, 766 N.E.2d 827, 830 (2002) ("Jenkins had been shot four times shortly before making the statement. Two bullets had pierced his chest, one of which had lodged in his spine. When police and emergency personnel arrived, he was 'very frightened,' grimacing in pain, bleeding, and asking for oxygen. He asked a treating emergency medical technician if he were going to die. She told him that 'it didn't look too good' for him. In the circumstances, it was not error for the judge to find that Jenkins believed at the time he made the statements that death was imminent."); Commonwealth v. Niemic, 427 Mass. 718, 724, 696 N.E.2d 117, 122 (1998) ("The evidence showed that, when the officer found the victim, he had been stabbed in the heart and was bleeding profusely. There was also testimony that, at the hospital, he was 'breathing heavily' and 'appeared to be having a hard time' and that the officer questioning him 'had to work to get his attention to focus.' It was permissible to infer from this that the victim was aware that he was dying.").

Before admitting the dying declaration, the trial judge must first determine by a preponderance of the evidence that the requisite elements of a dying declaration are satisfied. Commonwealth v. Green, 420 Mass. 771, 781–782, 652 N.E.2d 572, 579 (1995). If the statement is admitted, the judge must then instruct the jury that they must also find by a preponderance of the evidence that the same elements are satisfied before they may consider the substance of the statement. Id.

The broader statutory exception for declarations of a deceased person set forth in G. L. c. 233, § 65, applies only in civil cases. Commonwealth v. Dunker, 363 Mass. 792, 794 n.1, 298 N.E.2d 813, 815 n.1 (1973).

Subsection (b)(3). This subsection is derived from Commonwealth v. Carr, 373 Mass. 617, 622–624, 369 N.E.2d 970, 973–974 (1977), and Commonwealth v. Charles, 428 Mass. 672, 679, 704 N.E.2d 1137, 1144 (1999). See also Williamson v. United States, 512 U.S. 594 (1994). This subsection is applicable only to "statements made by witnesses, not parties to the litigation or their privies or representatives." Commonwealth v. McLaughlin, 433 Mass. 558, 565, 744 N.E.2d 47, 53 (2001), quoting P.J. Liacos, Massachusetts Evidence § 8.10 (7th ed. 1999). This exception against penal interest is applicable in civil and criminal cases. See Zinck v. Gateway Country Store, Inc., 72 Mass. App. Ct. 571, 575, 893 N.E.2d 364, 368 (2008). The admission by a party-opponent need not be a statement against the declarant's penal or proprietary interest. See Section 801(d)(2), Definitions: Statements Which Are Not Hearsay: Admission by Party-Opponent.

A declarant's narrative may include self-inculpatory and self-exculpatory elements.

> "[A]pplication of the evidentiary rule concerning declarations against penal interest to a full narrative requires breaking out which parts, if any, of the declaration are actually against the speaker's penal interest. Further, application of the hearsay exception requires determination whether the declaration has an evidentiary connection and linkage to the matters at hand in the trial."

Commonwealth v. Marrero, 60 Mass. App. Ct. 225, 229, 800 N.E.2d 1048, 1051–1052 (2003). When the self-inculpatory aspect of the narrative is very limited, the trial judge has discretion either to exclude it entirely or "to allow it in with some limited 'necessary surrounding context' to prevent its significance from being distorted" by opposing counsel. Commonwealth v. Dejarnette, 75 Mass. App. Ct. 88, 99, 911 N.E.2d 1280, 1289 (2009).

The judge's role in determining the admissibility of a statement against interest is to determine "whether, in light of the other evidence already adduced or to be adduced, there is some reasonable likelihood that the statement could be true." Commonwealth v. Drew, 397 Mass. 65, 76, 489 N.E.2d 1233, 1241 (1986). This means that in accordance with Section 104(b), Preliminary Questions: Relevancy Conditioned on Fact, the question whether to believe the declarant's statement is ultimately for the jury. Id.

A statement may qualify for admission as a declaration against penal interest even though it supplies circumstantial, and not direct, evidence of the declarant's guilt. See Commonwealth v. Charles, 428 Mass. at 679, 704 N.E.2d at 1144. In Commonwealth v. Charles, the Supreme Judicial Court also indicated that even though the exception does not explicitly require corroboration when the statement is introduced against the defendant, it would follow the majority rule and require it in such cases. Id. at 679 n.2, 704 N.E.2d at 1144 n.2. See, e.g., Commonwealth v. Pope, 397 Mass. 275, 280, 491 N.E.2d 240, 243 (1986) (reversing defendant's conviction based on erroneous admission of extrajudicial statement of a deceased witness; "[w]e do not believe that concern for penal consequence would inspire a suicide victim to truthfulness").

In criminal cases, "[i]n applying the corroboration requirement, judges are obliged to . . . consider as relevant factors the degree of disinterestedness of the witnesses giving corroborating testimony as well as the plausibility of that testimony in the light of the rest of the proof." Commonwealth v. Carr, 373 Mass. at 624, 369 N.E.2d at 974. The Supreme Judicial Court has explained that

> "behind the corroboration requirement of [Fed. R. Evid.] 804(b)(3) lurks a suspicion that a reasonable man might sometimes admit to a crime he did not commit. A classic example is an inmate, serving time for multiple offenses, who has nothing to lose by a further conviction, but who can help out a friend by admitting to the friend's crime."

Commonwealth v. Drew, 397 Mass. at 74 n.8, 489 N.E.2d at 1240 n.8. The Supreme Judicial Court has stated that

> "[o]ther factors the judge may consider are: the timing of the declaration and the relationship between the declarant and the witness, the reliability and character of the declarant, whether the statement was made spontaneously, whether other people heard the out-of-court statement, whether there is any apparent motive for the declarant to misrepresent the matter, and whether and in what circumstances the statement was repeated" (citation omitted).

Id. at 76, 489 N.E.2d at 1241. However,

> "[i]n determining whether the declarant's statement has been sufficiently corroborated to merit its admission in evidence, the judge should not be stringent. A requirement that the defendant corroborate the declarant's entire statement, for example, may run afoul of the defendant's due process rights . . . . If the issue of sufficiency of the defendant's corroboration is close, the judge should favor admitting the statement. In most such instances, the good sense of the jury will correct any prejudicial impact." (Citation omitted.)

Id. at 75 n.10, 489 N.E.2d at 1241 n.10. See Commonwealth v. Nutbrown, 81 Mass. App. Ct. 773, 779–780, 968 N.E.2d 418, 423–424 (2012) (in deciding whether statement is "trustworthy," trial judge must look only to credibility of declarant, leaving it to jury to determine credibility of witness who testifies to declaration). There is no requirement that when the statement is offered by the defendant, the exculpatory portion must also inculpate the declarant. See Commonwealth v. Keizer, 377 Mass. 264, 270, 385 N.E.2d 1001, 1005 (1979).

Subsection (b)(4)(A). This subsection is derived from Haddock v. Boston & Maine R.R., 85 Mass. 298, 300–301 (1862), and Butrick v. Tilton, 155 Mass. 461, 466, 29 N.E. 1088, 1089–1090 (1892). In Haddock v. Boston & Maine R.R., 85 Mass. at 298–299, the court allowed a witness to testify that she came into ownership of the property through her mother and grandmother even though the only basis for her knowledge was what the person she alleged to be her mother said to her. In Butrick v. Tilton, 155 Mass. at 466, 29 N.E. at 1089–1090, also a dispute over title to real property, the court permitted the alleged owner's granddaughter to testify as to how her grandfather came into ownership of the real estate, and that a cousin who owned the property before her grandfather died without children, based exclusively on what other family members told her and without any personal knowledge. See also Section 803(13), Hearsay Exceptions; Availability of Declarant Immaterial: Family Records; Section 803(19), Hearsay Exceptions; Availability of Declarant Immaterial: Reputation Concerning Personal or Family History.

Subsection (b)(4)(B). Massachusetts has not yet had occasion to consider Fed. R. Evid. 804(b)(4)(B), which extends the principle of Section 804(b)(4)(A) to others to whom the declarant is related by "blood, adoption or marriage," or to whom the declarant is so "intimately associated with . . . as to be likely to have accurate information concerning the matter declared."

Subsection (b)(5)(A). This subsection is taken verbatim from G. L. c. 233, § 65. This hearsay exception applies in "all civil cases." Harrison v. Loyal Protective Life Ins. Co., 379 Mass. 212, 219, 396 N.E.2d 987, 991 (1979). It does not apply in criminal proceedings. Commonwealth v. Cyr, 425 Mass. 89, 94 n.9, 679 N.E.2d 550, 554 n.9 (1997). Nor is it available to a party attempting to perpetuate the testimony of a person who is expected to die shortly. Anselmo v. Reback, 400 Mass. 865, 868–869, 513 N.E.2d 1270, 1272 (1987). See G. L. c. 233, §§ 46, 47; Mass. R. Civ. P. 27(a) (requirements to perpetuate testimony). The proponent of the evidence has the burden of establishing the foundational requirements of good faith and personal knowledge for the admissibility of the evidence. Kelley v. Jordan Marsh Co., 278 Mass. 101, 106, 179 N.E. 299, 302 (1932). Whether the proponent has met this burden, including proof that the statement was actually made, is a preliminary question of fact for the trial judge under Section 104(a), Preliminary Questions: Determinations Made by the Court. See Slotofski v. Boston Elevated Ry. Co., 215 Mass. 318, 321, 102 N.E. 417, 418 (1913).

The only ground of unavailability is the death of the declarant. G. L. c. 233, § 65. In the absence of a finding of good faith, the statement is not admissible. See Barbosa v. Hopper Feeds, Inc., 404 Mass. 610, 620, 537 N.E.2d 99, 105 (1989) (excluding declaration because it was made after the injury suffered by the plaintiff and at the time when the now-deceased person had an incentive to fabricate). "In general [the declarations] must be derived from the exercise of the declarant's own senses as distinguished from opinions based upon data observed by him or furnished by others." Little v. Massachusetts N.E. St. Ry. Co., 223 Mass. 501, 504, 112 N.E. 77, 78 (1916). "The declarations of the deceased may be in writing and need not be reproduced in the exact words used by the declarant" (citations omitted). Bellamy v. Bellamy, 342 Mass. 534, 536, 174 N.E.2d 358, 359 (1961). See id. (oral statements also admissible).

Subsection (b)(5)(B). This subsection is taken verbatim from G. L. c. 233, § 65A. See Thornton v. First Nat'l Stores, Inc., 340 Mass. 222, 225, 163 N.E.2d 264, 266 (1960). See also Mass. R. Civ. P. 33 (interrogatories to parties).

Subsection (b)(5)(C). This subsection is taken nearly verbatim from G. L. c. 233, § 66. In Rothwell v. First Nat'l Bank, 286 Mass. 417, 421, 190 N.E. 812, 814 (1934), the Supreme Judicial Court explained the difference between Section 65 and Section 66 of G. L. c. 233. "[Section 66] is narrower than the other, in that it relates to the declarations or conduct of one person in one sort of case. But it requires no preliminary finding of good faith or other conditions. These two statutes operate concurrently and independently." Id. See Greene v. Boston Safe Deposit & Trust Co., 255 Mass. 519, 524, 152 N.E. 107, 108 (1926).

Subsection (b)(5)(D). This subsection is taken verbatim from G. L. c. 233, § 79H.

Subsection (b)(5)(E). This subsection is taken verbatim from G. L. c. 152, § 20B. The statutory exception, however, might not overcome the further objection that it contains hearsay-within-hearsay in the form of statements to the employee's physician about how an injury occurred. See Fiander's Case, 293 Mass. 157, 164, 199 N.E. 309, 312 (1936).

Subsection (b)(6). This subsection is derived from Commonwealth v. Edwards, 444 Mass. 526, 540, 830 N.E.2d 158, 170 (2005). See Giles v. California, 554 U.S. 353, 373 (2008) (holding that the Sixth Amendment right to confrontation is not forfeited by wrongdoing unless the defendant acted with the intent to render the witness unavailable); Crawford v. Washington, 541 U.S. 36, 62 (2004) ("[T]he rule of forfeiture by wrongdoing [which we accept] extinguishes confrontation claims on essentially equitable grounds."). The Massachusetts common-law doctrine expressed in this subsection is fully consistent with the Federal doctrine set forth in Fed. R. Evid. 804(b)(6):

> "By requiring that the defendant actively assist the witness in becoming unavailable with the intent to make her unavailable, our doctrine of forfeiture by wrongdoing is at least as demanding as Fed. R. Evid. 804(b)(6), which permits a finding of forfeiture where the defendant 'acquiesced' in conduct that was intended to, and did, make the witness unavailable to testify."

Commonwealth v. Szerlong, 457 Mass. 858, 862–863, 933 N.E.2d 633, 639–640 (2010).

"A defendant's involvement in procuring a witness's unavailability need not consist of a criminal act, and may include a defendant's collusion with a witness to ensure that the witness will not be heard at trial." Commonwealth v. Edwards, 444 Mass. at 540, 830 N.E.2d at 170. In Edwards, the Supreme Judicial Court elaborated on the scope of this exception.

> "A finding that a defendant somehow influenced a witness's decision not to testify is not required to trigger the application of the forfeiture by wrongdoing doctrine where there is collusion in implementing that decision or planning for its implementation. Certainly, a defendant must have contributed to the witness's unavailability in some significant manner. However, the causal link necessary between a defendant's actions and a witness's una-

> vailability may be established where (1) a defendant puts forward to a witness the idea to avoid testifying, either by threats, coercion, persuasion, or pressure; (2) a defendant physically prevents a witness from testifying; or (3) a defendant actively facilitates the carrying out of the witness's independent intent not to testify. Therefore, in collusion cases (the third category above) a defendant's joint effort with a witness to secure the latter's unavailability, regardless of whether the witness already decided 'on his own' not to testify, may be sufficient to support a finding of forfeiture by wrongdoing." (Footnote omitted.)

Id. at 540–541, 830 N.E.2d at 171. "[W]here the defendant has had a meaningful impact on the witness's unavailability, the defendant may have forfeited confrontation and hearsay objections to the witness's out-of-court statements, even where the witness modified the initial strategy to procure the witness's silence." Id. at 541, 830 N.E.2d at 171. See also Commonwealth v. Szerlong, 457 Mass. at 865–866, 933 N.E.2d at 641–642 (evidence that defendant married alleged victim of his assault with the intent to enable her to exercise her spousal privilege at trial supported application of the doctrine of forfeiture by wrongdoing and thus the use of his wife's hearsay statements made before the marriage, even though it may not have been defendant's sole or primary purpose).

The proponent of the statement must prove that the opposing party procured the witness's unavailability by a preponderance of the evidence. Commonwealth v. Edwards, 444 Mass. at 542, 830 N.E.2d at 172. "[P]rior to a determination of forfeiture, the parties should be given an opportunity to present evidence, including live testimony [and the unavailable witness's out-of-court statements], at an evidentiary hearing outside the jury's presence." Id. at 545, 830 N.E.2d at 174. The trial judge should make the findings required by Commonwealth v. Edwards either orally on the record or in writing. Commonwealth v. Szerlong, 457 Mass. at 864 n.9, 933 N.E.2d at 641 n.9.

Subsection (b)(7). This subsection is derived from Kennedy v. Doyle, 92 Mass. 161, 168 (1865) (where the court admitted a baptismal record showing child's date of birth as evidence of the person's age when a contract had been made, in circumstances in which the entry was in the hand of the parish priest who had been the custodian of the book; Supreme Judicial Court observed that "[a]n entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger or notary, an attorney or solicitor or a physician, in the course of his secular occupation."). Contrast Derinza's Case, 229 Mass. 435, 443, 118 N.E. 942, 946 (1918) (copies of what purported to be a marriage certificate from a town in Italy not admitted in evidence; Supreme Judicial Court observed that there was no "evidence respecting their character, the circumstances under which the records were kept, or the source from which the certificates came. No one testified that they were copies of an official original. There was no authentication of them as genuine by a consular officer of the United States. There was absolutely nothing beyond the bare production of the copies of the certificates. In the absence of a statute making such certificates admissible by themselves, or something to show that they were entitled to a degree of credence, they were not competent."). See Section 803(6), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records.

Subsection (b)(8)(A). Subsections (b)(8)(A) through (b)(8)(A)(iv) are taken nearly verbatim from G. L. c. 233, § 81(a), and Subsection (b)(8)(A)(v) is derived from Commonwealth v. Colin C., 419 Mass. 54, 64–66, 643 N.E.2d 19, 25–26 (1994). See generally Opinion of the Justices, 406 Mass. 1201, 547 N.E.2d 8 (1989) (concluding that bill on related topic would, if enacted, offend the Massachusetts Constitution). The prosecution must give prior notice to the criminal defendant that it will seek to admit hearsay statements under this statute. Commonwealth v. Colin C., 419 Mass. at 64, 643 N.E.2d at 25. It must also show a compelling and necessary need to use this procedure by more than a preponderance of evidence. Id. at 64–65, 643 N.E.2d at 25.

Subsection (b)(8)(B). This subsection is taken nearly verbatim from G. L. c. 233, § 81(b). See Section 804(a), Hearsay Exceptions; Declarant Unavailable: Definition of Unavailability. A judge's reasons for finding a child

incompetent to testify should not be the same reasons for doubting the reliability of the child's out-of-court statements. Commonwealth v. Colin C., 419 Mass. 54, 65, 643 N.E.2d 19, 25 (1994).

Subsection (b)(8)(C). This subsection is taken nearly verbatim from G. L. c. 233, § 81(c). The separate hearing regarding the reliability of the out-of-court statement must be on the record, and the judge's determination of reliability must be supported by specific findings on the record. Commonwealth v. Colin C., 419 Mass. 54, 65, 643 N.E.2d 19, 25 (1994). See Commonwealth v. Joubert, 38 Mass. App. Ct. 943, 945, 647 N.E.2d 1238, 1241 (1995). The statement must be substantially reliable to be admissible. Commonwealth v. Joubert, 38 Mass. App. Ct. at 945, 647 N.E.2d at 1241. See Commonwealth v. Almeida, 433 Mass. 717, 719–720, 746 N.E.2d 139, 141 (2001) (statements of sleeping child were not admissible because they lacked indicia of reliability). The defendant and his or her counsel should be given the opportunity to attend the hearing if it would not cause the child witness severe emotional trauma. Commonwealth v. Colin C., 419 Mass. at 65, 643 N.E.2d at 25.

Subsection (b)(8)(D). This subsection is derived from Commonwealth v. Colin C., 419 Mass. 54, 66, 643 N.E.2d 19, 25–26 (1994).

Subsection (b)(8)(E). This subsection is taken nearly verbatim from G. L. c. 233, § 81(d).

Subsection (b)(9)(A). Subsections (b)(9)(A)(i) through (iv) are taken nearly verbatim from G. L. c. 233, § 82, and Subsection (b)(9)(A)(v) is derived from Adoption of Quentin, 424 Mass. 882, 893, 678 N.E.2d 1325, 1332 (1997). See Commonwealth v. Colin C., 419 Mass. 54, 64–66, 643 N.E.2d 19, 25–26 (1994) (establishing additional procedural requirements for admitting hearsay statements of child under G. L. c. 233, § 81). The Department of Children and Families must give prior notice to the parents that it will seek to admit hearsay statements under this statute. Adoption of Quentin, 424 Mass. at 893, 678 N.E.2d at 1332. It must also show a compelling and necessary need to use this procedure by more than a preponderance of evidence. Id. See also Adoption of Arnold, 50 Mass. App. Ct. 743, 752, 741 N.E.2d 456, 463 (2001); Adoption of Tina, 45 Mass. App. Ct. 727, 733–734, 701 N.E.2d 671, 676 (1998) (recognizing additional procedural requirements). When a care and protection proceeding is joined with a petition to dispense with consent to adoption, admissibility of a child's hearsay statements should comply with the stricter requirements of G. L. c. 233, § 82, not § 83. Adoption of Tina, 45 Mass. App. Ct. at 733 n.10, 701 N.E.2d at 676 n.10. The phrase "child under the age of ten" refers to the age of the child at the time the statement was made, not the child's age at the time of the proceeding. Adoption of Daisy, 460 Mass. 72, 78, 948 N.E.2d 1239, 1244 (2011).

Subsection (b)(9)(B). This subsection is taken nearly verbatim from G. L. c. 233, § 82(b). See Adoption of Sean, 36 Mass. App. Ct. 261, 266, 630 N.E.2d 604, 607 (1994). See also Section 804(a), Hearsay Exceptions; Declarant Unavailable: Definition of Unavailability.

Subsection (b)(9)(C). This subsection is taken nearly verbatim from G. L. c. 233, § 82(c). Note that it appears that the Legislature inadvertently omitted from G. L. c. 233, § 82, the following: "finds: (1) after holding a separate hearing, that such . . . ." We have inserted that language in the subsection above. See Adoption of Quentin, 424 Mass. 882, 890 n.5, 678 N.E.2d 1325, 1330 n.5 (1997) (noting omission). A judge must make sufficient findings of reliability to admit the statements. See Adoption of Tina, 45 Mass. App. Ct. 727, 733, 701 N.E.2d 671, 676 (1998); Edward E. v. Department of Social Servs., 42 Mass. App. Ct. 478, 484–486, 678 N.E.2d 163, 167–168 (1997). The separate hearing regarding the reliability of the out-of-court statement must be on the record, and the judge's determination of reliability must be supported by specific findings on the record. Adoption of Quentin, 424 Mass. at 893, 678 N.E.2d at 1332. See Commonwealth v. Colin C., 419 Mass. 54, 65, 643 N.E.2d 19, 25 (1994). See also Adoption of Olivette, 79 Mass. App. Ct. 141, 149–150, 944 N.E.2d 1068, 1075–1076 (2011).

PRESUMPTION OF INNOCENCE; BURDEN OF PROOF; UNANIMITY

The complaint against the defendant is only an accusation. It is not evidence. The defendant has denied that he (she) is guilty of the crime(s) charged in this complaint.

The law presumes the defendant to be innocent of (the charge) (all the charges) against him (her). This presumption of innocence is a rule of law that compels you to find the defendant not guilty unless and until the Commonwealth produces evidence, from whatever source, that proves that the defendant is guilty beyond a reasonable doubt. This burden of proof never shifts. The defendant is not required to call any witnesses or produce any evidence, since he (she) is presumed to be innocent.

The presumption of innocence stays with the defendant unless and until the evidence convinces you unanimously as a jury that the defendant is guilty beyond a reasonable doubt. It requires you to find the defendant not guilty unless his (her) guilt has been proved beyond a reasonable doubt.

Your verdict, whether it is guilty or not guilty, must be unanimous.

Commonwealth v. Boyd, 367 Mass. 169, 189, 326 N.E.2d 320, 332 (1975); *Commonwealth v. Devlin,* 335 Mass. 555, 569, 141 N.E.2d 269, 276-277 (1957); *Commonwealth v. DeFrancesco,* 248 Mass. 9, 142 N.E. 749 (1924).

NOTES:

1. **Function of charge.** The presumption of innocence is a doctrine that allocates the burden of proof and admonishes the jury to judge the defendant's guilt solely on the evidence and not on suspicions that may arise from the facts of arrest and charge. *Bell v. Wolfish,* 441 U.S. 520, 533, 99 S.Ct. 1861, 1870 (1979). It is not a true presumption, but a shorthand description of the right of the accused "to remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion" (citations omitted). *Taylor v. Kentucky,* 436 U.S. 478, 483 n.12, 98 S.Ct. 1930, 1934 n.12 (1978). It is "founded in humanity" and "upon the soundest principle of criminal law . . . that it is better that nine guilty persons should escape, than that one innocent man should suffer." *Commonwealth v. Anthes,* 5 Gray 185, 230 (1855).

2. **Required formulation.** The judge need not give any particular definition of the presumption of innocence if the charge makes clear that the complaint does not imply guilt and that the jury's decision must be based solely on the evidence and not on suspicion or conjecture. The latter point is covered by Instruction 2.03. But Massachusetts practice requires the judge, on request, to instruct the jury in terms that the defendant is "presumed to be innocent." *Commonwealth v. Blanchette,* 409 Mass. 99, 105, 564 N.E.2d 992, 996 (1991); *Commonwealth v. Drayton,* 386 Mass. 39, 46-47, 434 N.E.2d 997, 1003-1004 (1982).

3. **Impermissible formulations.** Embellishing the standard formulation is unnecessary and should be avoided. *Commonwealth v. Healy,* 15 Mass. App. Ct. 134, 138, 444 N.E.2d 957, 959 (1983). It is a "self-defeating qualification" and reversible error to explain that the presumption of innocence relates only to the government's burden and is unrelated to actual guilt. *Id.,* 15 Mass. App. Ct. at 135-138, 444 N.E.2d at 958-959. The judge should not describe the presumption of innocence as an initial "score of nothing to nothing." *Commonwealth v. Lutz,* 9 Mass. App. Ct. 357, 361-362, 401 N.E.2d 148, 151-152 (1980).

An instruction on the "disappearing presumption of innocence" derived from *Commonwealth v. Powers,* 294 Mass. 59, 63, 200 N.E. 562 (1936), is reversible error if it implies that the presumption disappears as soon as any evidence of guilt is introduced, but is not error if it indicates that the presumption disappears only after the Commonwealth has presented evidence that has convinced the jury beyond a reasonable doubt of the defendant's guilt. *Commonwealth v. O'Brien,* 56 Mass. App. Ct. 170, 174-175 & n.5, 775 N.E.2d 798, 801-802 & n.5 (2002); *Commonwealth v. Kane,* 19 Mass. App. Ct. 129, 139, 472 N.E.2d 1343, 1350 (1985). "[T]he disappearing presumption formulation is 'not preferred' . . . . It is conspicuously absent from the Model Jury Instructions for Use in the District Court (1995) and might best be avoided as an unnecessary and potentially confusing embellishment on the standard charge." *O'Brien, supra.*

4. **Comparing criminal burden with certainty of private decisions.** Analogizing the Commonwealth's burden of proof beyond a reasonable doubt to the degree of certainty used to make certain important private decisions is strongly disfavored, *Commonwealth v. McGrath,* 437 Mass. 46, 48, 768 N.E.2d 1075, 1076 (2002), and will constitute error unless the analogy clearly stands alone and does not modify or suggest it is the equivalent to language about moral certainty and reasonable doubt. See, e.g., *Commonwealth v. Watkins,* 425 Mass. 830, 838, 683 N.E.2d 653, 659 (1997); *Commonwealth v. Rembiszewski,* 391 Mass. 123, 129-130, 461 N.E.2d 201, 206 (1984); *Commonwealth v. Fielding,* 371 Mass. 97, 116, 353 N.E.2d 719, 731 (1976); *Commonwealth v. Libby,* 358 Mass. 617, 621, 266 N.E.2d 641, 644 (1971).

5. **General and specific unanimity.** The above model instruction includes a general unanimity instruction. "A general unanimity instruction informs the jury that the verdict must be unanimous, whereas a specific unanimity instruction indicates to the jury that they must be unanimous as to which specific act constitutes the offense charged." *Commonwealth v. Keevan,* 400 Mass. 557, 566-567, 511 N.E.2d 534, 540 (1987). For a model instruction on specific unanimity, see Instruction 2.320 (Multiple Incidents or Theories in One Count).

6. **Timing of instruction**. A judge must, upon request, instruct the jury that the defendant is presumed to be innocent, but it is within the judge's discretion when to do so. Even if the defense requests that the judge do so at the start of trial, a judge may choose to give the instruction with the rest of the charge after closing arguments and prior to deliberations. *Commonwealth v. Nancy M. Cameron*, 70 Mass. App. Ct. 1114, 877 N.E.2d 641, 2007 WL 4303057 (No. 06-P-1148, Dec. 10, 2007) (unpublished opinion under Appeals Court Rule 1:28).

REASONABLE DOUBT

I. *WEBSTER* CHARGE (MODERN SYNTAX)

The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant is guilty of the charge(s) made against him (her).

What is proof beyond a reasonable doubt? The term is often used and probably pretty well understood, though it is not easily defined. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt, for everything in the lives of human beings is open to some possible or imaginary doubt. A charge is proved beyond a reasonable doubt if, after you have compared and considered all of the evidence, you have in your minds an abiding conviction, to a moral certainty, that the charge is true.

I have told you that every person is presumed to be innocent until he is proved guilty, and that the burden of proof is on the prosecutor. If you evaluate all the evidence and you still have a reasonable doubt remaining, the defendant is entitled to the benefit of that doubt and must be acquitted.

It is not enough for the Commonwealth to establish a probability, even a strong probability, that the defendant is more likely to be guilty than not guilty. That is not enough. Instead, the evidence must convince you of the

defendant's guilt to a reasonable and moral certainty; a certainty that convinces your understanding and satisfies your reason and judgment as jurors who are sworn to act conscientiously on the evidence.

This is what we mean by proof beyond a reasonable doubt.

II. *WEBSTER* CHARGE (VERBATIM)

The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant is guilty of the charge(s) made against him (her).

"Then what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on . . . evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

"The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there

is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal.

"For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt . . . ."

NOTES:

1. **Model instructions.** The first model instruction above is a close paraphrase of the language of *Commonwealth v. Webster*, 5 Cush. 295, 320 (1850). The complex syntax of the original has been simplified, but all key *Webster* phrases have been preserved intact. For judges who prefer the traditional language, the second model instruction above is the exact language of *Webster*. Only the phrase "moral evidence" has been truncated to "evidence," since the term "moral evidence," which refers to "all evidence that is subject to human error and mistake," is archaic. R. McBride, The Art of Instructing the Jury 106-107 (Supp. 1978). See *Victor v. Nebraska*, 511 U.S. 1, 13, 114 S.Ct. 1239, 1246 (1994) ("Moral evidence, in this sentence, can only mean empirical evidence offered to prove such matters").

2. **Function of charge.** The Due Process Clause requires that in a criminal case every element of the crime charged must be proved beyond a reasonable doubt. "The reasonable-doubt standard . . . is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence . . . ." *In re Winship*, 397 U.S. 358, 363-364, 90 S.Ct. 1068, 1072-1073 (1970). A standard of proof serves to instruct the fact finder concerning the degree of confidence that he or she should have in the correctness of factual conclusions for a particular type of adjudication, to allocate the risk of error between the litigants, and to indicate the relative importance of the ultimate decision. In criminal cases our society has decided to exclude as nearly as possible the likelihood of an erroneous judgment and to impose almost the entire risk of error upon itself. *Addington v. Texas*, 441 U.S. 418, 423-424, 99 S.Ct. 1804, 1808 (1979).

3. **Defining reasonable doubt is mandatory.** The Supreme Court long ago noted the problem that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury," *Miles v. United States*, 103 U.S. 304, 312 (1881), and that the term "may be, and often is, rendered obscure by attempts at definition, which serve to create doubts instead of removing them," *Hopt v. Utah*, 120 U.S. 430, 440-441, 7 S.Ct. 614, 619 (1887). See also *United States v. Gibson*, 726 F.2d 869, 874 (1st Cir.), cert. denied, 466 U.S. 960

(1984) ("It can be said beyond any doubt that the words 'reasonable doubt' do not lend themselves to accurate definition").

Federal due process principles would permit a judge, in his or her discretion, to offer the jury no definition of the phrase "reasonable doubt." *United States v. Olmstead*, 832 F.2d 642, 644-646 (1st Cir. 1987), cert. denied, 486 U.S. 1009, 108 S.Ct. 1739 (1988); *United States v. Walton*, 207 F.3d 694, 696-697 (4th Cir. 2000); *United States v. Blackburn*, 992 F.2d 666, 668 (7th Cir. 1993); *United States v. Nolasco*, 926 F.2d 869, 872 (9th Cir. 1991); *United States v. Taylor*, 997 F.2d 1551, 1557 (D.C. Cir. 1993). For an excellent discussion of the arguments in favor of such a practice, see *Smith v. Butler*, 696 F. Supp. 748, 762-766 (D. Mass. 1988) (Woodlock, J.)

However, Massachusetts law requires more than the Federal Constitution does. It is error, and reversible error in a close case, for the judge to give the jury no definition of the phrase "beyond a reasonable doubt," even if the defendant fails to object to the omission. *Commonwealth v. Stellberger*, 25 Mass. App. Ct. 148, 515 N.E.2d 1207 (1987).

4. **Standard of review.** The standard of review for a reasonable doubt instruction is "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." *Victor*, 511 U.S. at 6, 114 S.Ct. at 1243, referring to *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970). A constitutionally deficient reasonable doubt instruction is never subject to harmless error review, since it "vitiates all the jury's findings." *Sullivan v. California*, 508 U.S. 275, 280, 113 S.Ct. 2078, 2082 (1993).

5. **Permissible formulations.** Massachusetts appellate courts have indicated that personal variations in a reasonable doubt charge are rarely prudent, and have repeatedly called for reasonable doubt to be explained "in close reliance on the time-tested language" of *Commonwealth v. Webster, supra. Commonwealth v. Ortiz*, 435 Mass. 569, 579, 760 N.E.2d 282, 290 (2002) (declining to overturn *Webster* reasonable doubt standard); *Commonwealth v. Ferreira*, 373 Mass. 116, 130 n.12, 364 N.E.2d 1264, 1273 n.12 (1977). See, e.g. *Commonwealth v. Wood*, 380 Mass. 545, 551, 404 N.E.2d 1223, 1228 (1980); *Commonwealth v. Lanigan*, 12 Mass. App. Ct. 913, 914-915, 423 N.E.2d 800, 802-803 (1981), cert. denied sub nom. *Maloney v. Lanigan*, 488 U.S. 1007 (1989). Indeed, there is "an unbroken line of cases which all but command that the definition of reasonable doubt be taken from the *Webster* case." *Commonwealth v. Fitzpatrick*, 16 Mass. App. Ct. 99, 100, 449 N.E.2d 392, 393 (1983).

Judges are discouraged from attempting "freehand embellishments" of the standard *Webster* charge. *Commonwealth v. Beldotti*, 409 Mass. 553, 562, 567 N.E.2d 1219, 1225 (1991). On the other hand, they are not required to deliver the *Webster* charge verbatim. The Supreme Judicial Court has noted its approval over the years of many "unimpeachable instructions . . . based on the key phrases of *Webster*, as modified and unquestionably improved by some variations from the exact language of the *Webster* case." *Ferreira, supra.* See *Commonwealth v. Randolph*, 415 Mass. 364, 367, 613 N.E.2d 899, 901 (1993) (upholding description of reasonable doubt as a "conscious uncertainty" and "an uncertainty you are aware of as to the defendant's guilt based on the evidence" and instruction that jury is "not to search for doubt"). See Instruction 2.200 for such an alternative.

The "heart" of the *Webster* charge is the phrase "moral certainty." *Commonwealth v. Therrien*, 371 Mass. 203, 207, 355 N.E.2d 913, 916 (1976). While acknowledging "that the use of this language in isolation, without further explanation, might amount to an erroneous instruction on reasonable doubt," the Supreme Judicial Court favors continued use of the term "if used as a part of or in conjunction with the approved charge from *Commonwealth v. Webster.*" *Commonwealth v. Pinckney*, 419 Mass. 341, 344-345, 644 N.E.2d 973,976-977 (1995). See *Beldotti, supra; Commonwealth v. Morse*, 402 Mass. 735, 738, 525 N.E.2d 364, 366 (1988); *Commonwealth v. Pires*, 389 Mass. 657, 664, 451 N.E.2d 1155, 1159-1160 (1983); *Commonwealth v. Conceicao*, 388 Mass. 255, 266-267, 446 N.E.2d 383, 390 (1983); *Commonwealth v. Williams*, 378 Mass. 217, 232-233, 391 N.E.2d 1202, 1212 (1979). Federal courts have been less sympathetic to the phrase. In the First Circuit it is error for Federal judges to use it, *United States v. DeWolf*, 696 F.2d 1, 4 (1st Cir. 1982); *United States v. Indorato*, 628 F.2d 711, 720-721 & n.8 (1st Cir.), cert. denied, 449 U.S. 1016 (1980), although the First Circuit concedes that it is "hard to imagine, without recourse to prolixity, a charge more reflective of the solemn and rigorous standard intended." *Lanigan v. Maloney*, 853 F.2d 40, 43 (1st Cir. 1988). The United States Supreme Court has suggested that the phrase "add[s] nothing to the words 'beyond a reasonable doubt'; one may require explanation as much as the other," *Hopt, supra*, 120 U.S. at 440, 7 S.Ct. at 619. While "not condon[ing] the use of the phrase," the Supreme Court tolerates its use by state courts when joined with the other *Webster* phrases which clarify its historical meaning as "the highest degree of certitude based on" empirical evidence. *Victor*, 511 U.S. at 11, 114 S.Ct. at 1245. The Appeals Court has affirmed, but discouraged, modification of the phrase by adding the italicized words "a moral, *but not necessarily absolute,* certainty." *Commonwealth v.*

Littleton, 38 Mass. App. Ct. 951, 952 n.2, 649 N.E.2d 162, 163 n.2 (1995).

The phrase "moral certainty" in an instruction must be accompanied by language that gives proper content to that phrase. To avoid reversible error, it should not be used without the other *Webster* wording that accompanies and elaborates on it. *Commonwealth v. Therrien,* 428 Mass. 607, 610, 703 N.E.2d 1175, 1178 (1998); *Commonwealth v. James,* 424 Mass. 770, 787-788, 678 N.E.2d 1170, 1182-1183 (1997); *Commonwealth v. Bonds,* 424 Mass. 698, 703, 677 N.E.2d 1131, 1134 (1997).

Massachusetts courts continue to affirm other key *Webster* phrases: e.g. that proof need not be beyond all possible doubt, *Commonwealth v. Seay,* 376 Mass. 735, 745 n.7, 383 N.E.2d 828, 834 n.7 (1978); that it is not enough to prove that the defendant's guilt is more probable than not, *Commonwealth v. Beverly,* 389 Mass. 866, 870-873, 452 N.E.2d 1112, 1115-1116 (1983); *Commonwealth v. Bannister,* 15 Mass. App. Ct. 71, 81, 443 N.E.2d 1325, 1332 (1983); that there must be certainty that satisfies the minds, judgment and consciences of reasonable jurors and leaves in their minds a settled conviction of guilt, *Commonwealth v. Rembiszewski,* 391 Mass. 123, 130, 461 N.E.2d 201, 206 (1984); *Beverly, supra*; *Seay, supra*; *Commonwealth v. Andrews,* 10 Mass. App. Ct. 866, 867-868, 408 N.E.2d 662, 664 (1980). In addition, "[t]he words 'beyond a reasonable doubt' are themselves evocative . . . ." *Commonwealth v. Ferguson,* 365 Mass. 1, 12, 309 N.E.2d 182, 189 (1974).

6. **Impermissible formulations.** Appellate courts have indicated that judges should not use the following phrases in charging on reasonable doubt:

"Abiding" or "obvious" doubt. The judge should not explain reasonable doubt as a doubt which a juror "finds abiding in his mind at the end of a full consideration of the facts of the case," since such language could be interpreted as calling upon the defendant to establish doubt in the jurors' minds. *Pinckney,* 419 Mass. at 347, 644 N.E.2d at 977. On the other hand, the judge should not suggest that a reasonable doubt is one that is "obvious" or "spontaneous" or "natural," since a reasonable doubt may arise only after careful consideration of the evidence. *Commonwealth v. Pettie,* 363 Mass. 836, 842, 298 N.E.2d 836, 840 (1973).

Abbreviated definition at start of case. "Whenever jurors are instructed on the crucial concept of reasonable doubt, they should receive a full and accurate instruction." *Commonwealth v. Walker,* 68 Mass. App. Ct. 194, 200-206, 861 N.E.2d 457, 463-467 (2007) (judge "courted confusion" by giving jury an abbreviated written definition of reasonable doubt at outset of case, followed by full *Webster* charge at its conclusion).

Analogies with personal decisions. The judge should not compare the degree of certainty required to convict with that involved in jurors' important personal decisions — e.g., whether to marry or whether to undergo surgery. *Commonwealth v. Kelleher,* 395 Mass. 821, 482 N.E.2d 804 (1985); *Rembiszewski, supra*; *Commonwealth v. Smith,* 381 Mass. 141, 407 N.E.2d 1291 (1980), habeas corpus denied sub nom. *Smith v. Butler,* 696 F. Supp. 748 (D. Mass. 1988); *Commonwealth v. Garcia,* 379 Mass. 422, 438-442, 399 N.E.2d 460, 471-473 (1980); *Commonwealth v. Canon,* 373 Mass. 494, 501-502, 368 N.E.2d 1181, 1185-1186 (1977); *Ferreira,* 373 Mass. at 128-129, 364 N.E.2d at 1272-1273 (1977); *Ferguson, supra*; *Commonwealth v. Bumpus,* 362 Mass. 672, 682, 290 N.E.2d 167, 175 (1972), vacated on other grounds, 411 U.S. 945 (1973), aff'd on rehearing, 365 Mass. 66, 309 N.E.2d 491 (1974), denial of habeas corpus aff'd sub nom. *Bumpus v. Gunter,* 635 F.2d 907 (1st Cir. 1980), cert. denied, 450 U.S. 1003 (1981); *Dunn v. Perrin,* 570 F.2d 21, 24 (1st Cir.), cert. denied, 437 U.S. 910 (1978); *Grace v. Butterworth,* 635 F.2d 1, 6 (1st Cir. 1980), cert. denied, 452 U.S. 917 (1981). Although it is not reversible error to analogize reasonable doubt to personal decisions of great significance as long as they remain unspecified, *Williams, supra,* it is better to avoid even such references since the degree of certainty required to convict is unique to the criminal law, and it may not even be possible to make private decisions according to this standard, *Ferreira,* 373 Mass. at 130, 364 N.E.2d at 1273. But see *Commonwealth v. Ambers,* 397 Mass. 705, 709 n.3, 493 N.E.2d 837, 840 n.3 (1986).

Comparison with civil standard. The judge should not contrast reasonable doubt with the civil burden of proof in terms of a percentage scale, since reasonable doubt is inherently qualitative and not subject to quantification. *Commonwealth v. Crawford,* 417 Mass. 358, 367, 629 N.E.2d 1332, 1337 (1994); *Commonwealth v. Sullivan,* 20 Mass. App. Ct. 802, 804-807, 482 N.E.2d 1198, 1199-1201 (1985). The Appeals Court has apparently discouraged even a correct distinction between the civil and criminal standards of proof, preferring *Webster* terminology. *Commonwealth v. Lanigan, supra.*

"Doubt based on a reason". The judge should not equate a reasonable doubt with a "doubt based on a reason," *Commonwealth v. Robinson*, 382 Mass. 189, 197-198, 415 N.E.2d 805, 811 (1981); *Commonwealth v. Coleman*, 366 Mass. 705, 712, 322 N.E.2d 407, 412 (1975); *Commonwealth v. Bjorkman*, 364 Mass. 297, 308, 303 N.E.2d 715, 722-723 (1973); *Commonwealth v. Cresta*, 16 Mass. App. Ct. 939, 940, 451 N.E.2d 440, 441 (1983), or with a "doubt for which a good reason can be given," *Commonwealth v. Lanoue*, 392 Mass. 583, 590-591, 467 N.E.2d 159, 164-165 (1984); *Commonwealth v. Thurber*, 383 Mass. 328, 333, 418 N.E.2d 1253, 1258 (1981); *Commonwealth v. Hughes*, 380 Mass. 596, 598-602, 404 N.E.2d 1246, 1248 (1980); *United States v. MacDonald*, 455 F.2d 1259, 1263 (1st Cir.), cert. denied, 406 U.S. 962 (1972); *Dunn*, 570 F.2d at 23-24, or with doubt that one can argue to fellow jurors "with principle and integrity," *Bumpus*, 635 F.2d at 910. Compare *Commonwealth v. Anderson*, 425 Mass. 685, 690, 682 N.E.2d 859, 863 (1997) (while "doubt based on a reason" or "founded upon a reason" would impermissibly shift the burden of proof to the defendant, the phrases "doubt based on reason" and "doubt founded upon reason" are permissible).

Negative examples. "The Supreme Judicial Court concluded in *Commonwealth v. Pires,* 389 Mass. 657, 664 (1983), that the concept of reasonable doubt 'is sufficiently metaphysical that it may be helpful to a jury to know what does not measure up to the standard.' As the use of negative examples, however, may have a tendency to minimize the high burden imposed on the government in criminal trials, trial judges must take particular care not to import illustrative examples which tend to confuse, rather than clarify, the definition of reasonable doubt." *Commonwealth v. Caramanica,* 49 Mass. App. Ct. 376, 378-379, 729 N.E.2d 656, 660 (2000) ("the confusing, circular locutions used by the judge here did more harm than good").

"Real reservoir of doubt". A charge on reasonable doubt should not include the "problematic" phrase that the jury must acquit if they are left with "a real reservoir of doubt." *Commonwealth v. Burke,* 44 Mass. App. Ct. 76, 80-81, 687 N.E.2d 1279, 1283 (1997).

"Shorthand" phrases. The judge should avoid extemporaneous or "short-form" phrases which the jury might take as a total substitute for the more precise and formal instructions, perhaps lessening the burden of proof. *Pettie,* 363 Mass. at 842-843, 298 N.E.2d at 840 (jury "won't be able to escape" a reasonable doubt). See *Therrien,* 371 Mass. at 207, 355 N.E.2d at 916 (jury should acquit if it has "serious unanswered questions"); *Fitzpatrick, supra* (reasonable doubt means jury must be "pretty darn sure"); *Commonwealth v. Hardy,* 31 Mass. App. Ct. 909, 910, 575 N.E.2d 355, 356 (1991) ("unnecessary and questionable departure" for judge to describe how he decides bench trials based on whether "satisfied in his own conscience as to a defendant's guilt").

"Should" have a firm belief in guilt. It is error to instruct that the jury "should" rather than "must" have "a firm and settled belief" in the defendant's guilt to convict. "[T]he misstep goes to the heart of the message embodied in *Webster:* where reasonable doubt remains, acquittal is mandatory." *Commonwealth v. Caramanica,* 49 Mass. App. Ct. 376, 378, 729 N.E.2d 656, 659-660 (2000).

"Substantial" or "grave" doubt. The judge should not define a reasonable doubt as an "actual substantial doubt" or a "grave uncertainty," since "the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Cage v. Louisiana,* 498 U.S. 39, 41, 111 S.Ct. 328, 329-330 (1990) (per curiam). See *Sullivan, supra.*

"Unreasonable" doubt. The judge should not charge that to acquit on an unreasonable doubt or the mere possibility of innocence would "make the lawless supreme." That phrase from the jury charge in the preface to *Commonwealth v. Madeiros,* 255 Mass. 304, 307 (1926), has emotional overtones, is one-sided, and improperly focuses on general public safety concerns rather than on the evidence. *Pinckney,* 419 Mass. at 347-348, 644 N.E.2d at 977-978; *Commonwealth v. Bembury,* 406 Mass. 552, 563, 548 N.E.2d 1255, 1261 (1990); *Commonwealth v. Sheline,* 391 Mass. 279, 291-297, 461 N.E.2d 1197, 1206-1209 (1984); *Commonwealth v. Tavares,* 385 Mass. 140, 147-149, 430 N.E.2d 1198, 1203-1204, cert. denied, 457 U.S. 1137 (1982); *Hughes, supra; Commonwealth v. Spann,* 383 Mass. 142, 150-151, 418 N.E.2d 328, 333-334 (1981); *Commonwealth v. Powers,* 9 Mass. App. Ct. 771, 771-773, 404 N.E.2d 1260, 1261-1262 (1980). It appears that the judge should also avoid the *Madeiros* language that the jury should deal "firmly" with crime. See *Williams,* 378 Mass. at 233-235, 391 N.E.2d at 1212-1213. Any instruction that absolute certainty is not required should be balanced by a statement to the effect that "belief in guilt at least

approaching absolute certainty *was* required." *Lanigan*, 853 F.2d at 47.

"Which side right"; even balance in the evidence. The judge should not suggest that the jury's task is to figure out which side is "right" rather than to determine whether the Commonwealth has proved the defendant's guilt beyond a reasonable doubt. *Lanigan*, 853 F.2d at 48. It is preferable not to charge that the jury should acquit upon an even balance in the evidence, since the jury may improperly infer that they may convict if the even balance tilted just slightly against the defendant. *Beverly*, 389 Mass. at 872-873, 452 N.E.2d at 1116-1117.

Slips of the tongue. In a reasonable doubt charge, the judge must be particularly careful to avoid slips of the tongue that invert the opposing concepts of "reasonable doubt" and "proof beyond a reasonable doubt." See, e.g., *Commonwealth v. Drumgold*, 423 Mass. 230, 254-259, 668 N.E.2d 300, 316-320 (1996) (charge that "ultimate fact of innocence or guilt . . . must be found beyond a reasonable doubt" erroneously implies that a not guilty verdict requires proof beyond a reasonable doubt); *Commonwealth v. A Juvenile*, 396 Mass. 215, 217-220, 485 N.E.2d 170, 172-174 (1985) (proof beyond a reasonable doubt erroneously defined as "not proof beyond all reasonable doubt"); *Wood*, 380 Mass. at 547-548, 404 N.E.2d at 1225-1226 (reasonable doubt erroneously defined as "doubt which amounts to a moral certainty"); *Commonwealth v. Grant*, 418 Mass. 76, 84-85, 634 N.E.2d 565, 570-571 (1994) (presumption of innocence erroneously explained as requiring jury to convict "unless his guilt has been proved beyond a reasonable doubt"); *Commonwealth v. Souza*, 34 Mass. App. Ct. 436, 443-444, 612 N.E.2d 680, 685 (1993) (reasonable doubt erroneously defined as "that state of the case [in] which . . . you feel an abiding conviction to a moral certainty of the truth of the charge"); *Commonwealth v. May*, 26 Mass. App. Ct. 801, 806, 533 N.E.2d 216, 220 (1989) (reasonable doubt erroneously defined as not "proof beyond the probability of innocence"); *Lanigan*, 853 F.2d at 46 (proof beyond a reasonable doubt erroneously defined as "a degree of moral certainty"); *Dunn*, 570 F.2d at 24 (reasonable doubt erroneously defined as "a strong and abiding conviction as still remains after careful consideration of all the facts and arguments"). The judge should be cautious in characterizing the antique language of *Webster*. *Commonwealth v. Dupree*, 22 Mass. App. Ct. 945, 494 N.E.2d 54 (1986) (reversible error to characterize *Webster* language as "a little silly").

CREDIBILITY OF WITNESSES

It will be your duty to decide any disputed questions of fact. You will have to determine which witnesses to believe, and how much weight to give their testimony. You should give the testimony of each witness whatever degree of belief and importance that you judge it is fairly entitled to receive. You are the sole judges of the credibility of the witnesses, and if there are any conflicts in the testimony, it is your function to resolve those conflicts and to determine where the truth lies.

You may believe everything a witness says, or only part of it or none of it. If you do not believe a witness's testimony that something happened, of course your disbelief is not evidence that it did *not* happen. When you disbelieve a witness, it just means that you have to look elsewhere for credible evidence about that issue.

In deciding whether to believe a witness and how much importance to give a witness's testimony, you must look at all the evidence, drawing on your own common sense and experience of life. Often it may not be *what* a witness says, but *how* he says it that might give you a clue whether or not to accept his version of an event as believable. You may consider a

witness's appearance and demeanor on the witness stand, his frankness or lack of frankness in testifying, whether his testimony is reasonable or unreasonable, probable or improbable. You may take into account how good an opportunity he had to observe the facts about which he testifies, the degree of intelligence he shows, whether his memory seems accurate. You may also consider his motive for testifying, whether he displays any bias in testifying, and whether or not he has any interest in the outcome of the case.

The credibility of witnesses is always a jury question, *Commonwealth v. Sabean,* 275 Mass. 546, 550, 176 N.E. 523, 524 (1931); *Commonwealth v. Bishop,* 9 Mass. App. Ct. 468, 471, 401 N.E.2d 895, 898 (1980), and no witness is incredible as a matter of law, *Commonwealth v. Hill,* 387 Mass. 619, 623-624, 442 N.E.2d 24, 27-28 (1982); *Commonwealth v. Haywood,* 377 Mass. 755, 765, 388 N.E.2d 648, 654-655 (1979). Inconsistencies in a witness's testimony are a matter for the jury, *Commonwealth v. Clary,* 388 Mass. 583, 589, 447 N.E.2d 1217, 1220-1221 (1983); *Commonwealth v. Dabrieo,* 370 Mass. 728, 734, 352 N.E.2d 186, 190 (1976), which is free to accept testimony in whole or in part, *Commonwealth v. Fitzgerald,* 376 Mass. 402, 411, 381 N.E.2d 123, 131 (1978). Disbelief of a witness is not affirmative evidence of the opposite proposition. *Commonwealth v. Swartz,* 343 Mass. 709, 713, 180 N.E.2d 685, 687 (1962).

The credibility of witnesses turns on their ability and willingness to tell the truth. *Commonwealth v. Widrick,* 392 Mass. 884, 888, 467 N.E.2d 1353, 1356 (1984). The third paragraph of the model instruction lists those factors that have been recognized as relevant to this determination. See *Commonwealth v. Owens,* 414 Mass. 595, 608, 609 N.E.2d 1208, 1216 (1993); *Commonwealth v. Coleman,* 390 Mass. 797, 802, 461 N.E.2d 157, 160 (1984). These were affirmed as correct and adequate in *Commonwealth v. A Juvenile,* 21 Mass. App. Ct. 121, 124 & n.5, 485 N.E.2d 201, 203 & n.5 (1985). But see *Commonwealth v. David West,* 47 Mass. App. Ct. 1106, 711 N.E.2d 951 (No. 98-P-783, June 28, 1999) (unpublished opinion under Appeals Court Rule 1:28) (characterizing reference in prior version of model instruction to witness's "character" as "inartful," and suggesting that instruction be rephrased). However, the judge is not required to mention the witnesses' capacity to recall and relate, since that approaches the matter of competence, which is for the judge. *Commonwealth v. Whitehead,* 379 Mass. 640, 657 n.20, 400 N.E.2d 821, 834 n.20 (1980).

In charging on credibility, the judge should avoid any suggestion that only *credible* testimony constitutes evidence. See *Commonwealth v. Gaeten,* 15 Mass. App. Ct. 524, 531, 446 N.E.2d 1102, 1107 (1983).

SUPPLEMENTAL INSTRUCTIONS

1. *Jurors' experience.* **You are going to have to decide what evidence you believe and what evidence you do not believe. This is where you as jurors have a great contribution to make to our system of justice. All six of you who will decide this case have had a great deal of experience in life and with human nature, and you can size up people. Without thinking much about it, you have been training yourself since childhood to determine whom to believe, and how much of what you hear to believe. You are to use all of your common sense, experience and good judgment in filtering all of this testimony, and in deciding what you believe and what you don't believe.**

2. *Interested witnesses.* **The fact that a witness may have some interest in the outcome of this case doesn't mean that the witness isn't trying to tell you the truth as that witness recalls it or believes it to be. But the witness's interest is a factor that you may consider along with all the other factors.**

3. *Number of witnesses.* **The weight of the evidence on each side does not necessarily depend on the number of witnesses testifying for one side or the other. You are going to have to determine the credibility of each witness who has testified, and then reach a verdict based on all the believable evidence in the case. You may come to the conclusion that the testimony of a smaller number of witnesses concerning some fact is more believable than the testimony of a larger number of witnesses to the contrary.**

Commonwealth v. McCauley, 391 Mass. 697, 703 n.5, 464 N.E.2d 50, 54 n.5 (1984); Committee on Pattern Jury Instructions, District Judges Ass'n of the Eleventh Circuit, *Pattern Jury Instructions—Criminal Cases* § 5 (1985 ed.).

4. *Discrepancies in testimony.* **Where there are inconsistencies or discrepancies in a witness's testimony, or between the testimony of different witnesses, that may or may not cause you to discredit such testimony.**

Innocent mistakes of memory do happen — sometimes people forget things, or get confused, or remember an event differently. In weighing such discrepancies, you should

consider whether they involve important facts or only minor details, and whether the discrepancies result from innocent lapses of memory or intentional falsehoods.

United States v. Jones, 880 F.2d 55, 67 (8th Cir. 1989); Charrow & Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," 79 Colum. L. Rev. 1306, 1345-1346 (1979); *Manual of Jury Instructions for the Ninth Circuit,* Instruction 3.08 (1985 ed.). In acknowledging the possibility of good faith mistakes by witnesses, the judge should not suggest how often this occurs. *Commonwealth v. Caramanica,* 49 Mass. App. Ct. 376, 379-380, 729 N.E.2d 656, 660 (2000) (judge intruded on jury's role by suggesting that "very few people come into court with an intention to mislead").

5. *Prosecution witness with plea agreement contingent on truthful testimony.* **In this case, you heard the testimony of** *[prosecution witness]*, **and you heard that he (she) is testifying under an agreement with the Commonwealth that in exchange for his (her) truthful testimony the Commonwealth will** *[summarize plea agreement]* . **You should examine that witness's testimony with particular care. In evaluating his (her) credibility, along with all the other factors I have already mentioned, you may consider that agreement and any hopes that he (she) may have about receiving future advantages from the Commonwealth. You must determine whether the witness's testimony has been affected by his (her) interest in the outcome of the case and any benefits that he**

(she) has received or hopes to receive.

When a prosecution witness testifies under a plea agreement that is disclosed to the jury and which makes the prosecution's promises contingent on the witness's testifying truthfully, the judge must "specifically and forcefully" charge the jury to use particular care in evaluating such testimony, in order to dissipate the vouching inherent in such an agreement. "We do not prescribe particular words that a judge should use. We do expect, however, that a judge will focus the jury's attention on the particular care they must give in evaluating testimony given pursuant to a plea agreement that is contingent on the witness's telling the truth." *Commonwealth v. Ciampa,* 406 Mass. 257, 266, 547 N.E.2d 314, 320-321 (1989). See *Commonwealth v. Marrero,* 436 Mass. 488, 500, 766 N.E.2d 461, 471 (2002) (construing *Ciampa*). See also *Cool v. United States,* 409 U.S. 100, 103, 93 S.Ct. 354, 357 (1972) (per curiam) (usually accomplice instructions are "no more than a commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity . . . . No constitutional problem is posed when the judge instructs a jury to receive the prosecution's accomplice testimony 'with care and caution'").

The *Ciampa* rule is not triggered where the prosecution's promises were already fully performed prior to the testimony, and there is nothing before the jury suggesting that the plea agreement was contingent on the witness's veracity or the Commonwealth's satisfaction. *Commonwealth v. James,* 424 Mass. 770, 785-787, 678 N.E.2d 1170, 1181-1182 (1997).

In non-*Ciampa* situations, a cautionary instruction to weigh an accomplice's testimony with care is discretionary with the judge. Although some cases encourage the giving of such a charge, *Commonwealth v. Andrews,* 403 Mass. 441, 458-459, 530 N.E.2d 1222, 1231-1232 (1988) ("judge should charge that the testimony of accomplices should be regarded with close scrutiny"); *Commonwealth v. Beal,* 314 Mass. 210, 232, 50 N.E.2d 14, 26 (1943) (describing the giving of such a charge as "the general practice"), in most circumstances such a charge is entirely in the judge's discretion. *Commonwealth v. Brousseau,* 421 Mass. 647, 654-655, 659 N.E.2d 724, 728-729 (1996) (no error in failing to fail to instruct specifically on witnesses testifying under immunity grant or plea bargain where judge adequately charged on witness credibility generally); *Commonwealth v. Allen,* 379 Mass. 564, 584, 400 N.E.2d 229, 241-242 (1980); *Commonwealth v. Watkins,* 377 Mass. 385, 389-390, 385 N.E.2d 1387, 1390-1391, cert. denied, 442 U.S. 932 (1979); *Commonwealth v. French,* 357 Mass. 356, 395-396, 259 N.E.2d 195, 225 (1970), judgments vacated as to death penalty sub nom. *Limone v. Massachusetts,* 408 U.S. 936 (1972). *Commonwealth v. Luna,* 410 Mass. 131, 140, 571 N.E.2d 603, 608 (1991) (involving a prosecution witness with only a contingent possibility of receiving a finder's fee in a future forfeiture proceeding), directed that "[i]n the future, a specific instruction that the jury weigh [an accomplice's] testimony with care should be given on request." However, *Commonwealth v. Daye,* 411 Mass. 719, 739, 587 N.E.2d 194, 206 (1992), subsequently held that it is not error to refuse such an instruction unless the "vouching" that triggers the *Ciampa* rule is present.

The model instruction is based in part on the instruction affirmed in *United States v. Silvestri,* 790 F.2d 186, 191-192 (1st Cir. 1986). See also Ninth Circuit Jury Instructions Committee, *Ninth Circuit Manual of Model Criminal Jury Instructions* § 4.9 (2003) (model instruction to effect that if a witness has received immunity or

other benefits in exchange for his or her testimony, or is an accomplice, in evaluating the witness's testimony, you should consider the extent to which or whether his or her testimony may have been influenced by such factors. In addition, you should examine that witness's testimony with greater caution than that of other witnesses); Judicial Council of the Eleventh Circuit, *Eleventh Circuit Pattern Jury Instructions (Criminal Cases)* Special Instruction 1.2 (2003) ("The testimony of some witnesses must be considered with more caution than the testimony of other witnesses. [An accomplice who has pleaded guilty in hopes of receiving leniency in exchange for his testimony] may have a reason to make a false statement because the witness wants to strike a good bargain with the Government. So, while a witness of that kind may be entirely truthful when testifying, you should consider such testimony with more caution than the testimony of other witnesses"); Committee on Standard Jury Instructions, *California Jury Instructions Criminal* Instruction 3.13 (2004) ("You may consider the testimony of a witness who testifies for the State as a result of [a plea agreement] [a promise that he will not be prosecuted] [a financial benefit]. However, you should consider such testimony with caution, because the testimony may have been colored by a desire to gain [leniency] [freedom] [a financial benefit] by testifying against the defendant").

Should the judge give a cautionary instruction when a former accomplice testifies as a defense witness? California has held that when an accomplice is called solely as a defense witness, it is error to instruct the jury sua sponte that it should view the testimony with distrust "since it is the accomplice's motive to testify falsely in return for leniency that underlies the close scrutiny given accomplice testimony offered against a defendant . . . . A defendant is powerless to offer this inducement." *People v. Guiuan*, 18 Cal. 4th 558, 567, 957 P.2d 928, 933-34 (Cal. 1998). See also Fishman, "Defense witness as 'accomplice': should the trial judge give a 'care and caution' instruction?," 96 J. Crim. L. & Criminology 1 (Fall 2005).

NOTES:

1. **Specific classes of witnesses.** Generally it is in the judge's discretion whether to include additional instructions about specific classes of witnesses, such as police officers, *Commonwealth v. Anderson*, 396 Mass. 306, 316, 486 N.E.2d 19, 25 (1985); *A Juvenile*, 21 Mass. App. Ct. at 125, 485 N.E.2d at 204, or children, *Id.* While an exceptional case "may be conceived of where the judge would be bound to particularize on the issue of credibility," no such case has been reported in Massachusetts. *Id.* If additional, specific instructions are given in the judge's discretion, they must not create imbalance or indicate the judge's belief or disbelief of a particular witness. *Id.*, 21 Mass. App. Ct. at 125, 485 N.E.2d at 203.

See Instruction 3.540 (Child Witness) for an optional charge on a child's testimony.

2. **Police witnesses.** "[O]rdinarily a trial judge should comply with a defendant's request to ask prospective jurors whether they would give greater credence to police officers than to other witnesses, in a case involving police officer testimony," but a judge is required to do so only there is a substantial risk that the case would be decided in whole or in part on the basis of extraneous issues, such as "preconceived opinions toward the credibility of certain classes of persons." *Commonwealth v. Sheline*, 391 Mass. 279, 291, 461 N.E.2d 1197, 1205-1206 (1983). See *Anderson, supra*; *Commonwealth v. Whitlock*, 39 Mass. App. Ct. 514, 521, 658 N.E.2d 182, 187 (1995); *A Juvenile, supra.*

The judge may not withdraw the credibility of police witnesses from the jury's consideration. "The credibility of witnesses is obviously a proper subject of comment. Police witnesses are no exception . . . . With a basis in the

record and expressed as a conclusion to be drawn from the evidence and not as a personal opinion, counsel may properly argue not only that a witness is mistaken but also that a witness is lying . . . . [T]he motivations of a witness to lie because of his or her occupation and involvement in the matter on trial can be the subject of fair comment, based on inferences from the evidence and not advanced as an assertion of fact by counsel." *Commonwealth v. Murchison,* 419 Mass. 58, 60-61, 634 N.E.2d 561, 563 (1994).

3. **Interested witnesses.** The defense is not entitled to require the judge to refrain from instructing the jury that, in assessing the credibility of a witness, they may consider the witness's interest in the outcome of the case. It is appropriate for a judge to mention that interest in the case is one of the criteria for assessing the credibility of witnesses, as long as the judge does so evenhandedly. *Commonwealth v. Ramos,* 31 Mass. App. Ct. 362, 368-369, 577 N.E.2d 1012, 1016 (1991).

4. **Defendant as witness.** It is permissible to charge the jury that they may consider the defendant's inherent bias in evaluating his or her credibility as a witness, but it is better not to single out the defendant for special comment. *United States v. Rollins,* 784 F.2d 35 (1st Cir. 1986); *Carrigan v. United States,* 405 F.2d 1197, 1198 (1st Cir. 1969). See *Reagan v. United States,* 157 U.S. 301, 15 S.Ct. 610 (1895).

5. **Witness's violation of sequestration order.** See *Commonwealth v. Sullivan,* 410 Mass. 521, 528 n.3, 574 N.E.2d 966, 971 n.3 (1991), for a charge on a witness's violation of a sequestration order.

RECORD APPENDIX TABLE OF CONTENTS

CRIMINAL DOCKET

DOCKET NUMBER	NO. OF COUNTS
1255CR001083	3

Trial Court of Massachusetts
District Court Department

DEFENDANT NAME AND ADDRESS	DOB	GENDER
Glenis A AdonSoto 91 Forest AVe Brockton, MA 02301	07/13/1991	Female

DATE COMPLAINT ISSUED: 07/23/2012

PRECOMPLAINT ARREST DATE: 07/22/2012

COURT NAME & ADDRESS:
Stoughton District Court
1288 Central Street
Stoughton, MA 02072

INTERPRETER REQUIRED: Spanish
Int. present - 8-15-12

FIRST FIVE OFFENSE COUNTS

COUNT	CODE	OFFENSE DESCRIPTION	OFFENSE DATE
1	90/24/J	OUI-LIQUOR OR .08% c90 §24(1)(a)(1)	07/22/2012
2	90/10/A	UNLICENSED OPERATION OF MV c90 §10	07/22/2012
3	89/9	STOP/YIELD, FAIL TO * c89 §9	07/22/2012

Christopher Demayo - 1-12-14

DEFENSE ATTORNEY: J. Eisenstadt - 8-15-12

OFFENSE CITY/TOWN: Stoughton

POLICE DEPARTMENT: Stoughton PD

DATE & JUDGE	DOCKET ENTRY	DATE & JUDGE	FEES IMPOSED
Saignane 8-15-12	☒ Attorney appointed (SJC R. 3:10) ☐ Atty denied & Deft. Advised per 211 D §2A ☐ Waiver of Counsel found after colloquy	8-15-12	Counsel Fee (211D § 2A¶2) $ 150 — ☐ WAIVED
	Terms of release set: ☒ PR ☐ Bail ☐ See Docket for special condition ☐ Held (276 §58A)		Counsel Contribution (211D § 2) $ ☐ WAIVED Default Warrant Fee (276 § 30¶1) $ ☐ WAIVED Default Warrant Arrest Fee (276 § 30 ¶2) $ ☐ WAIVED
Saignane 8-15-12	Arraigned and advised: ☒ Potential of bail revocation (276 §58) ☐ Right to bail to review (276 §58) ☐ Right to drug exam (111E § 10)		Probation Supervision Fee (276 § 87A) $ ☐ WAIVED Bail Order Forfeited
NO REQUEST FOR BAIL BY THE COMMONWEALTH	Advised of right to jury trial ☐ Waiver of jury found after colloquy ☐ Does not waive Advised of rights as pro se (Dist. Ct. Supp.R.4)		
	Advised of right of appeal to Appeals Ct. (M.R. Crim P.R. 28)		

SCHEDULING HISTORY

NO.	SCHEDULED DATE	EVENT	RESULT	JUDGE	TAPE START/ STOP
1	07/23/2012	Arraignment	☐ Held ☐ Not Held but Event Resolved ☐ Cont'd		
2	4-9-13	FAT	☐ Held ☐ Not Held but Event Resolved ☒ Cont'd	Dacey/White	10:34/Ct1
3	5-15-13	FAT	☐ Held ☐ Not Held but Event Resolved ☒ Cont'd Int present	Pomarole	9:45/Ct1
4	8-14-13	Trial	☐ Held ☐ Not Held but Event Resolved ☒ Cont'd Int. needed Int present		
5			☐ Held ☒ Not Held but Event Resolved ☐ Cont'd		
6			☐ Held ☐ Not Held but Event Resolved ☐ Cont'd		
7			☐ Held ☐ Not Held but Event Resolved ☐ Cont'd		
8			☐ Held ☐ Not Held but Event Resolved ☐ Cont'd		
9			☐ Held ☐ Not Held but Event Resolved ☐ Cont'd		
10			☐ Held ☐ Not Held but Event Resolved ☐ Cont'd		

APPROVED ABBREVIATIONS
ARR = Arraignment PTH = Pretrial hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRE = Status review
SRP = Status review of payments FAT = First appearance in jury session SEN = Sentencing CWF = Continuance-without-finding scheduled to terminate PRO = Probation scheduled to terminate
DFTA = Defendant failed to appear & was defaulted WAR = Warrant issued WARD = Default warrant issued WR = Warrant or default warrant recalled PVH = probation revocation hearing

A TRUE COPY ATTEST:	CLERK-MAGISTRATE / ASST CLERK	TOTAL NO. OF PAGES	ON (DATE)
	X		

CRIMINAL DOCKET DOCKET ENTRIES	DEFENDANT NAME Glenis A AdonSoto	DOCKET NUMBER 1255CR001083

DATE	DOCKET ENTRIES
7/23/12	Recog by Bail Commissioner (PR) for 7/23/12 (ad.)
7/23/12	12:03/ SI/ RDS / DTB
	Arraignment attempted → not completed as D only spoke Spanish
	ⓒ to 8/15/12 for arraignment (ARR); Spanish interpreter to be requested for this date.
8-15-12	9:48/SI/RDS/DTB
	ⓒ to 10-3-12 for PTH
	atty Eisenstadt appt on this date → $50 - LCF assessed.
	nac done for atty Eisenstadt
10/3/12	9:21, 10:20/ SI/ RDS / DTB
	Spanish interpreter present → req'd for next hearing date
	Motion for funds (PI) presented → no objection by Commonwealth → ALLOWED
	ⓒ to 12/7/12 for DCKE; S/T/C
12/7/12	9:47, 1:03/ SI / Canavan / DTB
	ⓒ to 2/14/13 for DCKE; S/T/C
	Spanish interpreter present → req'd for next hearing date
2/14/13	RDS/DTB
	Case continued to 4/9/13 for first appearance in JC session of DDG (FAT) Same terms and conditions. Pre-trial reports & certs. filed. Discovery complete.
	Spanish interpreter present & req'd for next court date
	→ Motion for Esp of John Colby pollack by D → no objection by Commonwealth → ALLOWED
8/14/13	Ct.2/McGuinness/9:24, CW Wt unavailable

APPROVED ABBREVIATIONS
ARR = Arraignment PTH = Pretrial hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRE = Status review SRP = Status review of payments FAT = First appearance in jury session SEN = Sentencing CWF = Continuance-without-finding scheduled to terminate PRO = Probation scheduled to terminate DFTA = Defendant failed to appear & was defaulted WAR = Warrant issued WARD = Default warrant issued WR = Warrant or default warrant recalled PVH = probation revocation hearing.

DOCKET CONTINUATION	NAME OF CASE: Glenis Adon SUO	DOCKET NUMBER: 12SCR1683

NO.	DATE	DOCKET ENTRIES
	9/14/13	and CW requesting a continuance. Case cont to 12/4/13 for trial. Interp. needed.
	10-1-13	MOTION TO SUBPOENA WITNESS FILED BY ATTY EISENSTADT. ALLOWED MCGUINNESS, & SUBPOENA TO ISSUE. COUNSEL GIVEN SUBPOENA TO SERVE.
	12/4/13	Ct 2 | McGuinness | 9:10. Int present. Both parties answer ready for trial. CW files MOT in Limine. Jury begins at 11:40 am. Mots in Limine filed by Δ – acted on as marked. CW rests at 2:15 pm. Δ's MOT for Req Finding of NG is denied. Δ rests. After trial, jury finds Δ guilty. The question from jury marked "A" for ID.
	12-9-13	Notice of Appeal; Motion to Withdraw; Motion for Appointment of ~~Appeal~~ Appellate Counsel & Certificate Of Service Filed by Atty. Eisenstadt.
	1-27-14	Notice of appearance filed by Christopher DeMayo, Esq.

CRIMINAL DOCKET - OFFENSES

DEFENDANT NAME: Glenis A AdonSoto

DOCKET NUMBER: 1255CR001083

COUNT / OFFENSE 1 OUI-LIQUOR OR .08% c90 §24(1)(a)(1)

DISPOSITION DATE AND JUDGE: 12/4/13 McGuinness

DISPOSITION METHOD
- ☐ Guilty Plea or ☐ Admission to Sufficient Facts accepted after colloquy and 278 §29D warning
- ☐ Bench Trial
- ☑ Jury Trial
- ☐ Dismissed upon:
  - ☐ Request of Commonwealth ☐ Request of Victim
  - ☐ Request of Defendant ☐ Failure to prosecute
  - ☐ Other:
- ☐ Filed with Defendant's consent
- ☐ Nolle Prosequi
- ☐ Decriminalized (277 §70 C)

FINE/ASSESSMENT	SURFINE	COSTS	OUI §24D FEE	OUI VICTIMS ASMT
			250	50
HEAD INJURY ASMT	**RESTITUTION**	**VW ASSESSMENT**	**BATTERER'S FEE**	**OTHER**
250		50		

SENTENCE OR OTHER DISPOSITION
- ☐ Sufficient facts found but continued without a finding until:
- ☑ Defendant placed on probation until: 12/3/14
  - ☐ Risk/Need or OUI ☐ Administrative Supervision
- ☐ Defendant placed on pretrial probation (276 §87) until:
- ☐ To be dismissed if court costs / restitution paid by: $605 mos PSF

24 D program
45 day LOL

FINDING
- ☑ Guilty ☐ Not Guilty
- ☐ Responsible ☐ Not Responsible
- ☐ Probable Cause ☐ No Probable Cause

FINAL DISPOSITION — JUDGE — DATE
- ☐ Dismissed on recommendation of Probation Dept.
- ☐ Probation terminated: defendant discharged
- ☐ Sentence or disposition revoked (see cont'd page)

COUNT / OFFENSE 2 UNLICENSED OPERATION OF MV c90 §10

DISPOSITION DATE AND JUDGE: 12/4/13 McGuinness

DISPOSITION METHOD
- ☐ Guilty Plea or ☐ Admission to Sufficient Facts accepted after colloquy and 278 §29D warning
- ☐ Bench Trial
- ☐ Jury Trial
- ☑ Dismissed upon:
  - ☑ Request of Commonwealth ☐ Request of Victim
  - ☐ Request of Defendant ☐ Failure to prosecute
  - ☐ Other:
- ☐ Filed with Defendant's consent
- ☐ Nolle Prosequi
- ☐ Decriminalized (277 §70 C)

FINE/ASSESSMENT	SURFINE	COSTS	OUI §24D FEE	OUI VICTIMS ASMT
HEAD INJURY ASMT	**RESTITUTION**	**VW ASSESSMENT**	**BATTERER'S FEE**	**OTHER**

SENTENCE OR OTHER DISPOSITION
- ☐ Sufficient facts found but continued without a finding until:
- ☐ Defendant placed on probation until:
  - ☐ Risk/Need or OUI ☐ Administrative Supervision
- ☐ Defendant placed on pretrial probation (276 §87) until:
- ☐ To be dismissed if court costs / restitution paid by:

FINDING
- ☐ Guilty ☐ Not Guilty
- ☐ Responsible ☐ Not Responsible
- ☐ Probable Cause ☐ No Probable Cause

FINAL DISPOSITION — JUDGE — DATE
- ☐ Dismissed on recommendation of Probation Dept.
- ☐ Probation terminated: defendant discharged
- ☐ Sentence or disposition revoked (see cont'd page)

COUNT / OFFENSE 3 STOP/YIELD, FAIL TO * c89 §9

DISPOSITION DATE AND JUDGE: 12/4/13 McGuinness

DISPOSITION METHOD
- ☐ Guilty Plea or ☐ Admission to Sufficient Facts accepted after colloquy and 278 §29D warning
- ☐ Bench Trial
- ☐ Jury Trial
- ☐ Dismissed upon:
  - ☐ Request of Commonwealth ☐ Request of Victim
  - ☐ Request of Defendant ☐ Failure to prosecute
  - ☐ Other:
- ☐ Filed with Defendant's consent
- ☐ Nolle Prosequi
- ☐ Decriminalized (277 §70 C)

FINE/ASSESSMENT	SURFINE	COSTS	OUI §24D FEE	OUI VICTIMS ASMT
HEAD INJURY ASMT	**RESTITUTION**	**VW ASSESSMENT**	**BATTERER'S FEE**	**OTHER**

SENTENCE OR OTHER DISPOSITION
- ☐ Sufficient facts found but continued without a finding until:
- ☐ Defendant placed on probation until:
  - ☐ Risk/Need or OUI ☐ Administrative Supervision
- ☐ Defendant placed on pretrial probation (276 §87) until:
- ☐ To be dismissed if court costs / restitution paid by:

FINDING
- ☐ Guilty ☐ Not Guilty
- ☑ Not Responsible
- ☐ Responsible ☐ No Probable Cause
- ☐ Probable Cause

FINAL DISPOSITION — JUDGE — DATE
- ☐ Dismissed on recommendation of Probation Dept.
- ☐ Probation terminated: defendant discharged
- ☐ Sentence or disposition revoked (see cont'd page)

CRIMINAL COMPLAINT ORIGINAL	DOCKET NUMBER 1255CR001083	NO. OF COUNTS 3	Trial Court of Massachusetts District Court Department

DEFENDANT NAME & ADDRESS	COURT NAME & ADDRESS
Glenis A AdonSoto 91 Forest AVe Brockton, MA 02301	Stoughton District Court 1288 Central Street Stoughton, MA 02072 (781)344-2131

DEFENDANT DOB	COMPLAINT ISSUED	DATE OF OFFENSE	ARREST DATE
07/13/1991	07/23/2012	07/22/2012	07/22/2012

OFFENSE CITY / TOWN	OFFENSE ADDRESS	NEXT EVENT DATE & TIME
Stoughton		07/23/2012 10:00 AM

POLICE DEPARTMENT	POLICE INCIDENT NUMBER	NEXT SCHEDULED EVENT
Stoughton PD	12-642-AR	Arraignment

OBTN		ROOM / SESSION
TSTU201200642	[redacted]	Arraignment Session

The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date(s) indicated below the defendant committed the offense(s) listed below and on any attached pages.

COUNT	CODE	DESCRIPTION
1	90/24/J	**OUI-LIQUOR OR .08% c90 §24(1)(a)(1)**

On 07/22/2012 did operate a motor vehicle upon a way, as defined in G.L. c.90, §1, or in a place to which the public has a right of access, or upon a way or in a place to which members of the public have access as invitees or licensees, with a percentage, by weight, of alcohol in his or her blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor, in violation of G.L. c.90, §24(1)(a)(1).

PENALTY: imprisonment for not more than 2½ years; or not less than $500, not more than $5000 fine; or both imprisonment and fine; plus $50 Victims of Drunk Driving Assessment; plus (if OUI $250 Head Injury Assessment; no filing or continuance without a finding; and license revoked for 1 year. §24Q: Defendants with a blood alcohol level of .20% must also attend alcohol or drug assessment by DPH or other court-approved program. §24D alternative disposition: If defendant eligible, after guilty finding or continuance without a finding, judge may allow as alternative: probation not more than 2 years, plus driver alcohol or controlled substance abuse education program, or alcohol or controlled substance abuse treatment or rehabilitation program, or both, plus its program fee, plus $250 assessment for apprehension, treatment and rehabilitation programs, plus $50 Victims of Drunk Driving Assessment, plus (if OUI $250 Head Injury Assessment, plus license suspended for not less than 45 days, not more than 90 days (or for 210 days, if defendant under age 21 on offense date . Defendants aged 17-21 with a blood alcohol level of .20% or more must attend a "14-day second offender in-home program."

2	90/10/A	**UNLICENSED OPERATION OF MV c90 §10**

On 07/22/2012, not being duly licensed or otherwise excepted by law, did operate a motor vehicle on a way, as defined in G.L. c.90, §1, in violation of G.L. c.90, §10.

(PENALTY from §20: not less than $100, not more than $1000.)

3	89/9	**STOP/YIELD, FAIL TO * c89 §9**

NOTE: THIS IS A CIVIL MV INFRACTION, SET FORTH HERE FOR PROCEDURAL PURPOSES ONLY. On 07/22/2012, while operating a motor vehicle on a way: (1) when approaching a stop sign or a flashing red signal indication, did fail to stop at a clearly marked top line, or if none, before entering the crosswalk on the near side of the intersection, or if none, then at the point nearest the intersecting roadway where he or she had a view of approaching traffic on the intersecting roadway before entering it, and after having stopped, to yield the right of way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when he or she was moving across or within the intersection or junction of roadways, not having being directed to proceed by a police officer; or (2) when approaching a yield sign, did fail in obedience to such sign to slow down to a speed reasonable for the existing conditions, and if required for safely to stop at a clearly marked stop line, or if none, before entering the crosswalk on the near side of the intersection, or if none, then at the point nearest the intersecting roadway where he or she had a view of approaching traffic on the intersecting roadway before entering it, and after slowing or stopping, to yield the right of way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when he or she was moving across or within the intersection or junction of roadways; or (3) did cross or enter an intersection which his or her vehicle was unable to proceed through without stopping and thereby blocking vehicles from travelling in a free direction, in violation of G.L. c.89, §9. (CIVIL ASSESSMENT: $100; Subsequent offense: $150.)

SIGNATURE OF COMPLAINANT	SWORN TO BEFORE ME/CLERK-MAGISTRATE/ASST.CLERK/DEP. ASST. CLERK	DATE
X	X	7/23/12
NAME OF COMPLAINANT	A TRUE COPY ATTEST	CLERK/MAGISTRATE/ ASST. CLERK	DATE
	X		

Notice to Defendant: 42 U.S.C. § 3796gg-4(e) requires this notice: If you are convicted of a misdemeanor crime of domestic violence you may be prohibited permanently from purchasing and/or possessing a firearm and/or ammunition pursuant to 18 U.S.C. § 922 (g) (9) and other applicable related Federal, State, or local laws.

IMPASSE

WHAT TO DO NOW?

Thank you

Jean K. Nelson Foreperson

Thank you. Your verdict must be unanimous. At 4:30 I will call you back into the session, unless you have reached a verdict before then, and release you for the evening; reconvening tomorrow morning at 10:00 AM.

12.4.13

EXHIBIT
A

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

STOUGHTON DISTRICT COURT
DOCKET #: 12-1083

COMMONWEALTH

v.

GLENIS ADONSOTO

Denied 12-4-13

MOTION FOR REQUIRED FINDING OF NOT GUILTY

Now comes the Defendant in the above captioned matter and hereby respectfully moves this Honorable Court, pursuant to Rule 25(a) of the Massachusetts Rules of Criminal Procedure, to enter a finding of not guilty on the above captioned matter on the grounds that the evidence taken in the light most favorable to Commonwealth is insufficient to sustain a conviction. See Commonwealth v. Lattimore, 378 Mass. 671, 677-78 (1979).

Respectfully submitted,
GLENIS ADONSOTO
By his Attorney,

Joseph D. Eisenstadt
2 Center Plaza, Suite 620
Boston, MA 02108
(617) 523-3500

Dated: 12/04/13

Massachusetts Office of Alcohol Testing
Breath Test Report Form

Stoughton PD

Test Date: 07/22/2012 Sequential Test #: 78
Dept. Case #: 12-642-AR Citation #: R2340733

Test Results: REFUSAL

Breath Test Instrument Certification
The breath test instrument was certified at the time the breath test was administered.

Model Number	Serial Number	Certification Begins	Certification Expires
Alcotest 9510	ARBF-0050	12/28/2011	12/28/2012

Calibration Standard Information

	Lot Number	Concentration	Expiration	Inlet
Dry Gas Cylinder:	DG0016	0.080	10/20/2013	CAL GAS INLET 2

Subject Information
Last Name: ADON D. O. B.: 07/13/1991
First Name, MI: GLENIS, S. License State: -
License #: -

Breath Test Sequence Details

Function	Result %BAC	Time HH:MM:SS	Volume Liters (L)	Duration Seconds (s)
Air Blank Test	-----	--:--:--		
Subject Test 1	-----	--:--:--	----L	----s
Air Blank Test	-----	--:--:--		
Calibration Check	-----	--:--:--		
Air Blank Test	-----	--:--:--		
Subject Test 2	-----	--:--:--	----L	----s
Air Blank Test	-----	--:--:--		

Breath Test Operator Certification
The Breath Test Operator was certified at the time the breath test was administered.

		Certification Begins	Certification Expires
Operator:	NEAL J. DAVID	07/14/2011	07/14/2014
Signature:		Signature Date:	07/22/2012

NOTICE OF SUSPENSION FOR A CHEMICAL TEST REFUSAL

OPERATOR INFORMATION

License #: - Lic. State: -
Operator: ADON, GLENIS S
Address: 91 FOREST AVE, BROCKTON, MASSACHUSETTS 02301
D.O.B.: 07/13/1991 Gender: FEMALE
Lic. Class: - Lic. Expires: -

NOTICE OF SUSPENSION

This is your formal notice of the intent to suspend your license or right to operate under M.G.L. Ch. 90, Sec. 24 (1)(f)(1). DRIVERS AGE 21 OR OVER: The suspension for this refusal will be for a period of not less than 180 days and up to life. DRIVERS UNDER AGE 21: The suspension for this refusal will be for a period of not less than three years for this and up to life, plus face an ADDITIONAL period of suspension of 180 days up to 1 year pursuant to M.G.L. Ch. 90 s. 24P. The suspension will occur **immediately**. No hardship licenses are authorized by law during the period of suspension, unless you are eligible for a first offenders disposition and your case has been resolved under M.G.L. c. 90 s. 24D.

ADDITIONAL NOTICE TO INDIVIDUALS OPERATING A VEHICLE REQUIRING A COMMERCIAL DRIVERS LICENSE

In addition to the above suspension, if you are operating a vehicle requiring a CDL license and your blood alcohol content is .04 or above, you will be disqualified from operating for a period of not less than one year, or up to life. There is no hardship license available for this period of time.

OPERATOR'S RIGHT TO A HEARING

M.G.L. Ch. 90 Sec. 24 (1)(g) reads, in part: "Any person whose license, permit, or right to operate has been suspended under subparagraph (1) of paragraph (f) shall, within fifteen days of suspension, be entitled to a hearing before the registrar which shall be limited to the following issues: (i) did the police officer have reasonable grounds to believe that such person had been operating a motor vehicle while under the influence of intoxicating liquor upon any way or in any place to which the members of the public have a right of access or upon any way to which the members of the public have a right of access as invitees or licensees, (ii) was such person placed under arrest, and (iii) did such person refuse to submit to such test or analysis."

TIME, DATE AND PLACE OF HEARING

You have the opportunity for such a hearing any Monday through Friday, excluding state, federal, and Suffolk County holidays, between 9:00 am and 3:00 pm. You have 15 days from the date of your arrest. These hearings are held only in the Boston office of the Registry, located at 630 Washington Street, 4th floor. Hearing requests at any other Registry branch will not be granted. Hearings are on a walk-in basis only. No extensions of the 15 day period following the arrest will be granted, and no phone calls, e-mails, or other communications with the Registry will change the terms of this notice in regards to your right to a hearing. **Note: By law, the Registry cannot issue any type of hardship, work or limited license during this suspension, and no hearing can be held on such requests, unless you are eligible for a first offenders disposition and your case has been resolved under M.G.L. c. 90 s. 24D.**

The officer below hereby certifies that they have served the operator with this notice and has submitted an electronic notification of this transaction to the Registry of Motor Vehicles.

Officer's Name: NEAL DAVID Date: 07/22/2012
Issuing Police Dept.: STOUGHTONPD Phone: 781-344-2424

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

DEDHAM DISTRICT COURT
DOCKET NO. 1255CR001683

COMMONWEALTH

V.

GLENIS ADONSOTO

12.4.13

COMMONWEALTH'S MOTION IN LIMINE

Now comes the Commonwealth and respectfully requests this Honorable Court to admit testimony that the Defendant consented to a breathalyzer test but was unable to successfully complete the test.

In support of its motion, the Commonwealth states:

1. The defendant consented to the breathalyzer test. The defendant attempted to take the test three times. Each time she attempted the test she did not provide an adequate sample in an attempt not to provide a full and correct breath sample.

2. The introduction of evidence of a failed breathalyzer attempt does not violate a Defendant's right against self-incrimination. Commonwealth v. Curley, No. 09-P-1463 (Mass. App. Ct. Oct. 25, 2010)(slip op.). See Exhibit One.

Respectfully Submitted
For the Commonwealth

Michael Thaler
Assistant District Attorney
Norfolk County District Attorney's Office
631 High Street
Dedham, Massachusetts 02026

Date: December 3, 2013

EXHIBIT ONE

Term

COMMONWEALTH vs. James M. CURLEY.

No. 09-P-1463.

April 9, 2010. - October 25, 2010.

Motor Vehicle, Operating under the influence: *Evidence*, Breathalyzer test. *Constitutional Law*, Self-incrimination, Breathalyzer test.

COMPLAINT received and sworn to in the Marlborough Division of the District Court Department on September 19, 2008.

The case was tried before *Jonathan Brant*, J.

Adriana Contartese for the defendant.

Erin M. Bell, Assistant District Attorney, for the Commonwealth.

Present: Berry, Vuono, & Hanlon, JJ.

HANLON, J.

The defendant was convicted after a jury trial of operating a motor vehicle while under the influence of intoxicating liquor in violation of G.L. c. 90, § 24(1)(*a*)(1). [FN1] On appeal, he argues that the trial judge erred in permitting the Commonwealth to introduce testimony about his failed efforts to take a breathalyzer test. We affirm.

Background. The jury could have found the following: Police Officer Craig Perry saw the defendant make an illegal right turn through a red light on Main Street in the town of Hudson at approximately 3:00 P.M. on September 18, 2008. When Officer Perry turned on his blue lights, the defendant accelerated and drove away; he stopped a short time later in a parking lot. The defendant told the officer that he was coming from a local bar, but he initially denied having anything to drink. [FN2] Perry observed the defendant with red and glassy eyes; he could smell an odor of alcohol, and the defendant's speech was slurred. The officer called for assistance, and he asked the defendant to perform certain field sobriety tests. The defendant agreed but, according to Officer Perry, his performance was "not too good"; in fact, the officer opined that the defendant failed all of the tests and that he was too impaired by alcohol to drive. The defendant was then arrested and taken by another officer, Officer John Donovan, to the police station. [FN3]

At the police station, the defendant was given an opportunity to take a breathalyzer test. Sergeant Christopher Shea, the patrol supervisor, testified that, when asked to take the test, the defendant responded with questions about the effects of alcohol, whether they depended on a person's body weight and when he had eaten, and the "timing of first and last drinks." [FN4] Sergeant Shea did not answer the questions; he offered the defendant a consent form for the test, and the defendant

continued to question him. Eventually, the defendant said that he wanted to take the test, but he wanted a drink of water first. Shea explained that the procedure did not permit him to take anything by mouth before taking the test. The defendant then agreed to take it, and he signed the consent form.

Officer Donovan instructed the defendant "to blow into the mouthpiece with a deep breath with his lips sealed around ... the edge of ... the mouthpiece so that the sample could go into the machine, and he [the defendant] kept blowing with his mouth open so the air would not go into the machine." Donovan told the jury that, if the machine does not get enough of a breath sample, it will not give a reading. Both Donovan and Shea testified that the defendant went through the process four times, each time blowing in the same way, and never producing a reading.

After the test process, the defendant began to complain that he was going "to be going into a diabetic shock." The arresting officer, Perry, who had been trained as a fire fighter and an emergency medical technician, did not see any of the symptoms that he had been trained to look for, nor did Sergeant Shea. Nevertheless, an ambulance was called; paramedics arrived, and the defendant told them that his complaint was "dehydration." He was transported to a local hospital at approximately 4:30 P.M.; Officer Perry accompanied him to the hospital because he was still in custody.

At the hospital, the defendant reiterated that he had low blood sugar; however, it was the opinion of the paramedics that "his blood sugar was fine," and the hospital staff then "did a test for dehydration," and gave him "one bag of intravenous fluid." During the hour that the defendant was at the hospital, he made a telephone call to his brother. Officer Perry overheard the defendant's side of the conversation and testified he heard him say "he's in the hospital, he got nervous--he got pulled over by the police, he was nervous to take the test so he pulled a fast one, and then he laughed."

When the defendant was returned to the station, he demanded to take a breathalyzer test. Shea told him that the time for the test was over but he re-advised him of his rights under G.L. c. 263, § 5A. [FN5] In response, the defendant became argumentative, threatening, the officer testified, to "drive a car drunk again."

The defendant testified that he had gone to see his dentist in the afternoon.

> [FN6] He then went for lunch by himself at a Chinese restaurant and had a "Mai Tai." After lunch, he drove to leave a check with his attorney. [FN7] He then drove to meet his brother at "a bar called Yours and Mine." He had a drink called a "Sea Breeze" and left after ten minutes. [FN8] Officer Perry stopped him soon afterwards, and he acknowledged making an illegal right turn on a red light.

The defendant testified that he was nervous during the field sobriety tests but he believed that he performed them well. At the police station, he told the police officers that his lips were cracked and dry and he would need "a drink of water or at least some Chapstick ... if they wanted me to blow on that thing." He denied making any complaint about his blood sugar. His request for water was refused and, eventually, he was transported to a hospital and given intravenous fluids. He admitted speaking to his brother from the hospital and telling him that he had pulled "a fast one," an expression he testified referred to his illegal right turn on a red light. He did not disagree with the officer's description of him as laughing, saying, "I did not feel in any way that I was impaired to a point where I was going to, what happened happened, so I ... probably wasn't taking it as serious as I should have. I was in a good mood, ... like I say, I had a coupla drinks in me, uh, I wasn't worried, I just wasn't worried, you know." Other than saying that he was dehydrated and his lips were chapped, the defendant never specifically described what happened when he tried to take the test.

Discussion. The defendant argues that admitting evidence of his failed breathalyzer attempts violated his right against self-incrimination because the failed attempts were

tantamount to a refusal, citing *Opinion of the Justices*, 412 Mass. 1201, 1210-1211 (1992). [FN9]

It is well settled that evidence of a defendant's refusal to take a chemical breath test offered by a police officer is not admissible against him in a trial for operating under the influence of intoxicating liquor. See *Opinion of the Justices*, 412 Mass. at 1211, where the court reasoned that "such refusal evidence is both compelled and furnishes evidence against oneself ..., [and] therefore would violate the privilege against self-incrimination of art. 12" of the Massachusetts Declaration of Rights. See also G.L. c. 90, § 24(1)(*e*) [FN10]; *Commonwealth v. Healy*, 452 Mass. 510, 513 (2008) ("It is well settled in Massachusetts that a defendant's refusal to submit to a blood alcohol or field sobriety test is inadmissible at trial"); *Commonwealth v. Ranieri*, 65 Mass.App.Ct. 366, 370-371 (2006). [FN11]

The underlying rationale for this holding is that "'a defendant's refusal is the equivalent of his statement, 'I have had so much to drink that I know or at least suspect that I am unable to pass the test.' ... Based on this analysis, evidence of a refusal to submit to a requested breathalyzer test is testimonial in nature." *Opinion of the Justices*, 412 Mass. at 1209. Such a statement is compelled, the court reasoned, by the choice ordinarily facing such a defendant. "The accused is thus placed in a 'Catch-22' situation: take the test and perhaps produce potentially incriminating real evidence; refuse and have adverse testimonial evidence used against him at trial." *Id.* at 1211.

In this case, the defendant did *not* refuse to take the breathalyzer test; had he done so, evidence of that refusal would have been inadmissible against him. Instead, he signed a form indicating that he *consented* to take the test.

[FN12] What followed--a series of physical actions--was properly the subject of the observing police officer's testimony. This is not the "Catch 22" situation that gave rise to the court's concern in *Opinion of the Justices, supra*--one in which a criminal defendant has no choice but to provide incriminating evidence against himself. This defendant had a choice that would not have incriminated him, that is, he could have refused to take the breathalyzer test. [FN13] Instead, he chose to sign the consent form. Thereafter, the jury could have inferred from his actions, as the Commonwealth argued, that he was trying to avoid giving a sample while appearing to try to take the test. Accordingly we conclude that the evidence was properly admitted. [FN14]

Judgment affirmed.

FN1. In a subsequent, jury-waived trial, the defendant was found guilty of operating under the influence of intoxicating liquor, third offense. He was also found responsible for a civil motor vehicle infraction of failure to stop or yield, G.L. c. 89, § 8; this infraction was placed on file.

FN2. Eventually, he told Officer Perry that he had had two cocktails--a "Mai Tai" and a "Sea Breeze"--at two different locations.

FN3. Donovan also noticed an odor of alcohol, slurred speech, red and glassy eyes, and an unsteady gait. The defendant told him that he had had two drinks, including a glass

of wine.

FN4. There was no objection to this testimony.

FN5. General Laws c. 263, § 5A, provides an operator with the right to be examined immediately by a physician selected by him, including the right to obtain a blood test at his own expense to determine his blood alcohol level.

FN6. The dentist testified that he knew the defendant, that he had filled a tooth for him that afternoon, that he had no odor of alcohol on his breath, and that he did not appear to be intoxicated.

FN7. The attorney testified that he saw the defendant briefly at 3:00 P.M. and exchanged pleasantries. He did not notice anything unusual about the defendant.

FN8. The bartender at Yours and Mine, who went to school with the defendant and has known him for thirty years, testified that she served him a "Sea Breeze" and that she believed that he was "perfectly fine" when he walked in. She said that he stayed perhaps fifteen minutes and was fine when he left.

FN9. The Commonwealth argues that the defendant did not object to the evidence when it was offered and, therefore, that the standard of review is whether any "supposed error created a substantial risk of a miscarriage of justice." Because we find no error, it is not necessary to determine whether the standard of review is substantial risk of a miscarriage of justice or harmless error. However, we note that the defendant *did* object to this evidence. He filed a motion in limine, seeking to have it excluded, as the Commonwealth concedes, and the motion judge, who was also the trial judge, denied the motion. The defendant objected at that time, and he objected twice during the trial when the evidence was offered.

FN10. General Laws c. 90, § 24(1)(*e*), as amended through St.2003, c. 28, §§ 3 & 4, provides, in pertinent part, "In any prosecution for a violation of paragraph (*a*), evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, ... as indicated by a chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor; provided, however, that if such test or analysis was made by or at the direction of a police officer, it was made with the consent of the defendant.... *Evidence that the defendant failed or refused to consent to such test or analysis shall not be admissible against him in a civil or criminal proceeding* ..." (emphasis supplied).

FN11. The court has extended the same analysis to a refusal to perform field sobriety tests. See *Commonwealth v. McGrail*, 419 Mass. 774, 779-780 (1995) ("We see very

little difference between evidence of refusal to take a breathalyzer test and refusal to take a field sobriety test."); *Commonwealth v. Grenier*, 45 Mass.App.Ct. 58, 61-62 (1998); *Commonwealth v. Ranieri*, 65 Mass.App.Ct. at 371-373.

FN12. In another context, this court has held that "[t]he consent to take the test impliedly contemplates the taking of a valid test (one that would be admissible in court)." *Commonwealth v. Sabourin*, 48 Mass.App.Ct. 505, 506 (2000).

FN13. This case is also distinguishable from cases where the defendant's *statements* about his ability to do field sobriety tests were deemed testimonial evidence revealing his own assessment of his sobriety. See *Commonwealth v. Grenier*, 45 Mass.App.Ct. at 61-62 ("Although he offered the excuse that he was not trained to do the test, the jury would have been warranted in inferring that he thought he could not do the test because he had had too much to drink").

FN14. We decline to address the defendant's remaining and unsupported arguments, that admission of his "attempts" to take the breathalyzer test forced him to testify and that, because he also suffered driver's license consequences with the registrar for not completing the test, it was somehow unfair that the evidence was used against him in his criminal trial. See Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

NORFOLK, ss.

STOUGHTON DISTRICT COURT
DOCKET NO. 1383

COMMONWEALTH

v.

GLENIS ADONSOTO,
Defendant.

12.4.13

MOTION IN LIMINE TO EXCLUDE REFUSAL EVIDENCE

Now comes the defendant and, through her attorney, moves that this honorable court order that the officer in this case not offer evidence of, or otherwise refer to, the fact that the defendant failed to participate in field sobriety tests or the breathalyzer examination. As grounds therefore, the Supreme Judicial Court has held that any such "refusal" evidence is inadmissible against a defendant in a criminal case. *Commonwealth v. McGrail*, 419 Mass. 774 (1995).

Respectfully Submitted,
GLENIS ADONSOTO
By Her Attorney,

Joseph D. Eisenstadt
2 Center Plaza, Suite 620
Boston, MA 02108
(617) 523-3500

Dated: 3/04/13

NORFOLK, ss
STOUGHTON DISTRICT COURT

COMMONWEALTH OF MASSACHUSETTS,	)	
v.	)	No. 1255 CR 1083
GLENIS ADONSOTO, Defendant.	)	

MOTION TO SETTLE INAUDIBLE PORTION OF THE TRIAL TRANSCRIPT

Pursuant to Mass. R. App. P. 8(b)(3)(v), Defendant Glenis Adonsoto moves the Court to settle an inaudible portion of the trial transcript in this case. As described in the accompanying Affidavit of Christopher DeMayo, Ms. Adonsoto's trial counsel, Joseph Eisenstadt, has prepared an affidavit summarizing his memory of an objection he made at a sidebar which not fully recorded by the audio equipment.

Ms. Adonsoto respectfully requests the Court to adopt Mr. Eisenstadt's reconstruction of the inaudible sidebar and to include it in the trial transcript.

Respectfully submitted,

Glenis Adonsoto,

By her attorney,

Christopher DeMayo (BBO # 653481)
Law Office of Christopher DeMayo
38 Montvale Avenue, Suite 200
Stoneham, MA 02180
781-572-3036
lawofficeofchristopherdemayo@gmail.com

Certificate of Service

I, Christopher DeMayo, certify that on September 19, 2014 I caused copies of the foregoing Motion to Settle Inaudible Portion of the Trial Transcript, together with the accompanying Affidavit of Christopher DeMayo, to be served on counsel for the Commonwealth by serving a copy on the following:

Michael Thaler, ADA
Norfolk County District Attorney's Office
631 High Street
Dedham, MA 02026

Christopher DeMayo

NORFOLK, ss
STOUGHTON DISTRICT COURT

COMMONWEALTH OF MASSACHUSETTS,	)	
v.	)	No. 1255 CR 1083
GLENIS ADONSOTO, Defendant.	)	

AFFIDAVIT OF CHRISTOPHER DEMAYO

I, Christopher DeMayo, being over the age of 18, affirm as follows:

1. I have been appointed by the Committee for Public Counsel Services to represent Ms. Adonsoto during the appeal of her conviction in the above-captioned case.

2. While reviewing the record in this case I noticed that the sidebar following the objection at the top of page 80 of the trial transcript was inaudible. See **Attachment A.** Believing the objection might be relevant to the appeal, I contacted Ms. Adonsoto's trial counsel, Joseph Eisenstadt, who prepared an affidavit summarizing his memory of what transpired at this sidebar. See **Attachment B.**

3. Pursuant to Massachusetts Rule of Appellate Procedure 8, I contacted the ADA who tried the case, Michael Thaler, in an attempt to stipulate to the content of the inaudible sidebar on page 80. Mr. Thaler stated that he did not recall exactly what was

said at this sidebar and that he was unwilling to stipulate to Mr. Eisenstadt's reconstruction.

Signed under the pains and penalties of perjury this 19th day of September, 2014.

Christopher DeMayo

Christopher DeMayo

ATTACHMENT

A

NORFOLK, ss.

DEDHAM DISTRICT COURT
C.A. NO. 1255CR1083

COMMONWEALTH OF
MASSACHUSETTS,

VS.

GLENIS ADONSOTO,

TRIAL

Date: December 4, 2013

Place: Dedham District Court

631 High Street

Dedham, MA 02062

Before: The Honorable James McGuinness, Jr.

(From court CD supplied, no court reporter present)

station?
A She was.
Q And back at the station do you as a police officer have any sort of --
MR. THALER: Strike that.
Q (by Mr. Thaler) When you have a -- when you have a prisoner or a person who is brought in who doesn't speak any English do you have any sort of protocol you follow?
A Yes, we do.
Q What is that?
A There's a hotline that's -- that was given to us, a hotline number we contact and get a registered, certified interpreter on the line.
Q Do you mind describing for the jurors how that works?
A It goes through my -- my shift commander. He gives us a PIN; we call the 800 number, operator comes on the line, we give them a PIN that identify our police station. Once that PIN is confirm he -- this operator put us through to a interpreter whatever language you may need. They put you through to that interpreter. Everything is done on speaker so that the defendants hear

what's going on, my supervisor hear what going on, I know what's going on, and the interpreter know what's going on.

Q Have you ever used that procedure before this night?

A Yes.

Q And you indicated that it's done on speaker?

A Yes.

Q Is the speaker loud enough that it could be heard by everyone in the room?

A It has to be, yes.

Q And so, then at that point how does it work in terms of how things are communicated?

A I identify myself to the interpreter; I explain my police station, my rank, explain to her the arrest that we have, not in total form just in a general form, explain the language that is being spoken to me. Another time I inform the interpreter that I will be giving certain instructions to the prisoner that I would like her to translate.

MR. EISENSTADT: Your Honor, could I ask, could we approach briefly, please.

THE COURT: All right.

MR. EISENSTADT: Thank you.

(Sidebar)

MR. EISENSTADT: Now, (inaudible) this interpreter service (inaudible).

THE COURT: Yeah, I know of it.

MR. EISENSTADT: That's -- That's a concern considering what they intend to elicit.

THE COURT: Yeah.

MR. EISENSTADT: The whole basis of the refusal was her inability to follow instructions but (inaudible).

THE COURT: It's the kind of a thing that, you know, you saw this testimony coming.

MR. EISENSTADT: We did, right.

THE COURT: There was no address, you know, by motion in limine or otherwise.

MR. EISENSTADT: Well, there was as to the refusal.

THE COURT: No. No. No, of it -- of the use of the interpreter line. The subject is grist for cross examination and then you can argue the weight of it but that's about as good as it's going to get.

MR. EISENSTADT: Understood.

THE COURT: Okay. Thank you.

MR. THALER: Thank you.

(Conclusion sidebar)

Q (by Mr. Thaler) Officer David, once you have this procedure with the Spanish interpreter set up what was the next thing you did?

A We advised the prisoner of her rights.

Q And what rights were that?

A Basic rights. She has a right to remain silent, anything she said can and will be held against her in a court of law; she have the right to an attorney; she have a right to be -- Just her general rights.

Q So what -- How did the process go, did you speak a line and then the line is translated?

A That's correct.

Q And do you have to wait each time?

A Yes.

Q And from your observations did the defendant in any way respond when she's getting -- when it's being translated to her in Spanish?

A She's -- She's -- She keeps nodding her head, you know, yes.

Q Nod her head up and down --

A Yes.

Q -- or left to right?
A Up and down.
Q And you observed that to occur?
A Yes.
Q And after you went over those initial rights did you go over any other rights?
A Yes, her OUI rights.
Q Did you go over her Breathalyzer rights?
A Yes.
Q And do you mind describing for the jurors how that transpired?
A Again, there's a form that we have to read where rights are concerned under the OUI law. I read that sentence by sentence to the translator; she translated to the prisoner, at the end of that I asked her did the prisoner understood her rights. She asked the prisoner if she understood her rights, the prisoner responded yes in Spanish. The translator told me what she said.
Q So in that situation would the translator specifically say yes --
A Yes.
Q -- or how did that work?
A She said yes she understand her rights.

ATTACHMENT

B

NORFOLK, ss
STOUGHTON DISTRICT COURT

COMMONWEALTH OF MASSACHUSETTS,	)	
v.	)	No. 1255 CR 1083
GLENIS ADONSOTO, Defendant.	)	

AFFIDAVIT

I, Joseph Eisenstadt, being over the age of 18, affirm as follows:

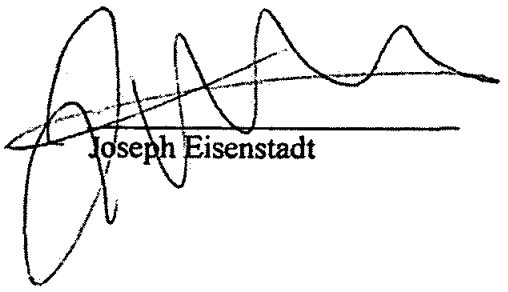
1. I was Glenis Adonsoto's trial counsel in the above-captioned case. The trial was held on December 4, 2013 in Dedham District Court.

2. Ms. Adonsoto's appellate counsel has asked me for my recollection of an objection I made during the trial, which occurs at the top of page 80 of the trial transcript. This portion of the audio recording of the sidebar conference was partly inaudible and could not be completely transcribed.

3. My objection concerned the admission of testimony by a Stoughton police officer, Neal David, regarding what Ms. Adonsoto had said to a Spanish-English translator who had translated by telephone while Ms. Adonsoto was administered a breathalyzer test. To the best of my recollection, the basis for my objection was essentially that Officer David's testimony was hearsay. The Commonwealth was seeking

to introduce evidence of Ms. Adonsoto's failure to follow the instructions for blowing into the breathalyzer device. These instructions were being conveyed to her over the phone by the translator. No one was able to present evidence of exactly what the translator had said to Ms. Adonsoto or exactly what Ms. Adonsoto had said to the translator.

Signed under the pains and penalties of perjury this 29th day of July, 2014.



Joseph Eisenstadt

NORFOLK, ss
STOUGHTON DISTRICT COURT

COMMONWEALTH OF MASSACHUSETTS,	)	
v.	)	No. 1255 CR 1083
GLENIS ADONSOTO, Defendant.	)	

After reviewing the transcript and affidavit, I am unable to adopt attorney Eisenstadt's recollection of the sidebar conversation. Motion Denied
J. McGuinness
11.26.14

MOTION TO SETTLE INAUDIBLE PORTION OF THE TRIAL TRANSCRIPT

Pursuant to Mass. R. App. P. 8(b)(3)(v), Defendant Glenis Adonsoto moves the Court to settle an inaudible portion of the trial transcript in this case. As described in the accompanying Affidavit of Christopher DeMayo, Ms. Adonsoto's trial counsel, Joseph Eisenstadt, has prepared an affidavit summarizing his memory of an objection he made at a sidebar which not fully recorded by the audio equipment.

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STOUGHTON DISTRICT COURT
SEP 22 2014
CLERK MAGISTRATE